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Supreme Court of the United States

TERM, 1971

No. 70-5388

OTIS LOPER,

Petitioner,

—v.—

GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1971
CERTIORARI GRANTED OCTOBER 12, 1971

Supreme Court of the United States

TERM, 1971

No. 70-5388

OTIS LOPER,

Petitioner,

—v.—

GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 66-H-657

OTIS LOPER, PETITIONER

vs.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT

AMENDED PETITION OF OTIS LOPER
FOR THE WRIT OF HABEAS CORPUS

TO SAID HONORABLE COURT:

Comes now OTIS LOPER, Petitioner in the above entitled and numbered cause, and with leave of Court files this his Amended Petition for the Writ of Habeas Corpus and would respectfully show:

1.

Petitioner is a citizen of the United States and a resident of Walker County, Texas.

2.

Petitioner is restrained of his liberty in violation of the Constitution and laws of the State of Texas and the United States in the custody of Dr. George J. Beto, Respondent, Director, Texas Department of Corrections. Petitioner is incarcerated at the Wynn Unit of the Texas Department of Corrections located in Huntsville, Walker County, Texas.

3.

The claim and authority by virtue of which Petitioner is restrained of his liberty is a judgment of the Criminal

District Court of Harris County, Texas, in Cause No. 58,883, styled "The State of Texas v. Otis Loper," rendered on November 20, 1947. The judgment of the Criminal District Court of Harris County, Texas, is void and without authority of law, and the imprisonment of Petitioner is a denial of the rights guaranteed him by the Constitution and laws of the State of Texas and the United States as hereinafter shown.

4.

At the time of his indictment and arrest for the felony offense of rape for which he was tried and convicted, Petitioner was indigent, and this fact was well known to the Court, and the District Attorney. Despite the State's knowledge of his indigency making it impossible for Petitioner to employ counsel to assist him in defending the charge against him, Petitioner was denied Court-appointed counsel to assist him in the investigation and preparation of his defense until the day of trial. In this regard, Petitioner would show that he was arrested on the charge of rape and held in the Harris County jail for a considerable period prior to trial, and that he was not informed that counsel had been appointed to represent him until November 17, 1947, the date of trial. Petitioner says that he was thereby denied an opportunity to consult with his attorney prior to trial and to obtain assistance of counsel in the investigation and preparation of his defense to the charge, all of which resulted in a denial of Petitioner's rights to a fair and impartial trial and to the effective assistance of counsel.

5.

Petitioner further says that he was denied the right to have an examining trial and to appear before the court and ask for an attorney, to request bond be set, and to examine the witnesses against him before grant jury action was taken.

6.

Petitioner was arrested on August 9, 1947. He was tried for the offense of rape, for which he is now in-

carcerated, on November 17, 1947. Between the aforementioned dates, Petitioner was at all times in custody in the Harris County jail. He was not arraigned prior to November 17, 1947 and no examining trial was held. Petitioner would show that on November 17, 1947, he was brought from the Harris County jail to the Courtroom of the Criminal District Court of Harris County, Texas, by an officer of the Court, and there for the first time was informed that counsel had been appointed to represent him. Immediately after informing Petitioner that counsel had been appointed to represent him, the Court called for announcement of the case, and the trial was begun immediately. Petitioner would further show that he was unlearned in the law and the processes thereof, and did not know of his right to time to prepare his defense. Moreover, he was wholly dependent upon the assistance of the attorney the Court had provided him. Petitioner would show that the totality of circumstances surrounding this "hurry up" procedure of arraignment, trial and conviction on the same day, coupled with the fact that he was not given an opportunity to consult with his court-appointed counsel prior to trial, and, being incarcerated and not versed in law, was not himself able to prepare for trial, resulted in a denial of a petitioner's right to a fair and impartial trial by jury and to the effective assistance of counsel.

7.

Petitioner would further show that during the trial of the case he was denied his constitutionally protected right to confront the witnesses against him and that the State of Texas suppressed evidence and witnesses, thereby denying his right to a fair and impartial trial. In this regard, Petitioner would show that, not having been afforded counsel prior to trial, he, finally and in desperation caused to be issued several witness subpoenas, and that the State had subpoenaed Petitioner's then wife, Willett Loper. The subpoena directed to Petitioner's wife was returned unserved, and when Petitioner, on trial of the case, called his wife as a witness she was not in at-

tendance. Petitioner requested the Court to continue the case until he had an opportunity to try and secure her attendance as a witness, but the Court refused such a continuance, and directed the trial to proceed. Petitioner believes that at the time his wife was living in Lufkin, Texas, and previous to the trial had written representatives of the State of Texas asking to be notified of the date of trial so she could be in attendance. Petitioner himself did not know the whereabouts of his wife, and could not himself inform her of the date and time of the trial. Petitioner would show that the State, knowing the whereabouts of the witness and knowing her materiality as a witness for the defense, failed to notify Petitioner of her whereabouts, allowed the subpoena to be returned unserved without relating to Petitioner or to the Court the whereabouts of the witness and her desire to be in attendance, and thereby actively or negligently suppressed evidence and testimony material to Petitioner's defense in violation of his constitutionally guaranteed right of a fair trial. Moreover, Petitioner alleges that the State had knoweldge of witnesses who would testify that the offense for which Petitioner was convicted was never in fact committed, and that knowledge of the existence of these witnesses was willfully or negligently suppressed from the Petitioner and the Court, denying Petitioner his right to a fair and impartial trial.

8.

Petitioner's trial on the offense of rape was held on November 17, 1947, and was begun and concluded on that date. In fact, Petitioner would show the Court that the whole trial took approximately 2 or 3 hours from the time jury selection began until the verdict was returned. Immediately after the verdict was returned, Petitioner's Court-appointed counsel left the courtroom and Petitioner never saw his Court-appointed counsel again. Sentence was passed on November 20, 1947, in the absence of counsel. Petitioner would show that this procedure resulted in his being deprived of representation by counsel at every critical stage of the proceedings.

9.

Petitioner would further show that he was deprived of the right to appeal and of counsel on appeal by the abandonment of his Court-appointed counsel as mentioned in the preceding paragraph, and the failure of the Court to afford him counsel to perfect his appeal. In this regard Petitioner would show that he brought home to the Court his desire to appeal by requesting from the Court a transcript of the trial, stating to the Court that he wanted to do something about his case. The Court thereupon referred him to the Clerk of the Court, but, because of his incarceration and his transfer to the State Prison in Huntsville, and because of the lack of assistance of a counsel, Petitioner was unable to perfect his appeal. Petitioner would show that he was thereby denied the right to appeal, equal protection of the law, and effective assistance of counsel.

10.

Petitioner would further show that he was denied equal protection of law and due process of law in connection with revocation of his parole. In this regard, Petitioner would show that he was paroled by the State Board of Pardons and Parole on November 15, 1962 and obtained permission to and did move to Mississippi. While in Carthedge, Mississippi, on February 11, 1963, he was arrested on a charge of car theft which was later dismissed. When he attempted to secure his release from jail in Mississippi, on the car theft charge, he was informed by the parole officer to whom he had been assigned in Mississippi that the Texas authorities had revoked his parole. Petitioner would show that he was not afforded notice that revocation of his parole was being considered by the Texas authorities. Petitioner was denied a hearing before the Texas Board of Pardons and Paroles as was required by Section 20 of Article 7081d of the Texas Code of Criminal Procedure of 1948, then in effect. Nor was he afforded counsel to represent him at the revocation of parole proceedings. Petitioner was returned to the Texas

Department of Corrections and incarcerated and such incarceration has continued to the present time.

11.

Petitioner took the stand in his own defense at his trial, and the State was allowed to introduce evidence of, and question him concerning, prior convictions in an attempt to discredit his testimony. Petitioner would show the Court that the convictions used for impeachment were void for the reason that Petitioner was deprived of the right to representation by counsel on the trials resulting in such prior convictions. The prior convictions were, therefore, unavailable for impeachment or any other purpose, and their use by the State deprived plaintiff of fair and impartial trial by jury.

12.

Petitioner has applied to the District Court of Harris County, Texas and the Court of Criminal Appeals of Texas for the writ of habeas corpus on the same grounds included herein, but said applications were without hearing denied by the 176th District Court, Honorable Wendall A. Odom, Judge, on the 17th day of October, 1968, and by the Court of Criminal Appeals of Texas on the 25th day of April, 1969.

WHEREFORE, Petitioner prays that a writ of habeas corpus issue directed to Dr. George J. Beto, Director, Texas Department of Corrections, by whom Petitioner is detained, for the purpose of inquiring into the cause of imprisonment and restraint, that Petitioner be afforded a full plenary hearing hereon and that upon final hearing hereof Petitioner be discharged from the legal confinement.

Dan G. Matthews
800 Bank of the Southwest Bldg.
Houston, Texas 77002
CA 4-7070
Attorney for Petitioner

[Affidavit Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Caption Omitted in Printing]

RESPONDENT'S ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Dr. George J. Beto, Respondent in the above entitled and numbered cause, and respectfully makes his answer as follows:

I.

Respondent denies each and every allegation of fact made by petitioner except those facts supported by the Record and those facts specifically admitted by the Respondent.

II.

Respondent is the Director of the Texas Department of Corrections and holds legal custody of Petitioner by virtue of a valid judgment and sentence in Cause No. 58,883 from the Criminal District Court of Harris County, Texas styled *The State of Texas* v. *Otis Loper*.

The Grand Jury of Harris County, Texas, returned an indictment against Petitioner on September 17, 1947 charging him with the capital offense of rape. On August 9, 1947, Petitioner had obtained unlawful carnal knowledge of the 8 year old daughter of a woman with whom he had been living.

Petitioner retained two attorneys to represent him on this charge. One of the attorneys was the Honorable James Letts, now deceased, who at the time he was retained by Petitioner, had specialized in the defense of criminal cases for over 30 years. The other attorney was Mr. J. D. Harris who was also experienced in the trial of criminal cases.

On November 4, 1947, Mr. Letts was present in the office of the Sheriff of Harris County where, as counsel for Petitioner, he approved the list of 125 special veniremen who had been chosen for Petitioner's case. A copy of the same list was also served on Petitioner at a later date.

Petitioner's case came on for trial on November 17, 1947 with the retained counsel present in his behalf. Petitioner had, without the knowledge of his counsel, caused subpoenas to be issued for several persons, including two doctors. The prosecution had issued subpoenas for several persons including the mother of the victim. All the subpoenas of both parties had been served except for the subpoena on Willette Loper, the victim's mother. The subpoena for Willette Loper had been returned unserved with the notation that Willette Loper had moved from the address on the subpoena and that her whereabouts were unknown. These facts were made known to all the parties before they announced ready for trial. The prosecution did not attempt to call Willette Loper because she probably was the common law wife of Petitioner and, under Texas law, she could not be used as a witness against her husband. During the trial, the Defense attorneys saw Willette Loper in the Courthouse and concluded that she had consumed too much alcoholic beverages to be useful as a witness for the defense.

Petitioner was duly arraigned by having the indictment read to him and by entering a plea of not guilty. After the jury was selected, Petitioner again entered a plea of not guilty and the evidence was then presented to the jury. On the same day, November 17, 1947, the jury returned its verdict finding Petitioner guilty as charged in the indictment. Petitioner and his counsel were both relieved that the jury did not assess the death penalty.

During the trial, Petitioner and counsel discussed the advisability of calling the two doctors as witnesses. Counsel informed Petitioner that counsel understood that Petitioner had seriously injured the victim and that counsel felt the doctors should not be called because if they so testified, it would seriously harm the defense. Since Petitioner had no idea what information would be gained from the doctors, it was decided not to take a chance on their testimony.

Counsel for Petitioner filed a Motion for New Trial which was overruled by the trial court on November 20, 1947. The Motion was not seriously urged because of counsel's feeling that if it were granted, the second trial

would be conducted by the Criminal District Attorney personally and would in all probability result in the assessment of the death penalty.

After the overruling of the Motion for New Trial, Petitioner was formally sentenced to confinement in the State penitentiary for not less than five nor more than fifty years. No Notice of Appeal was given because it was not the intent of the Petitioner or his counsel to appeal the conviction. Since no appeal was perfected, there is no record of the testimony presented at the Petitioner's trial.

III.

Petitioner is a veteran applicant for the writ of habeas corpus who has filed numerous applications in State District Courts, the Court of Criminal Appeals, and at least two United States District Courts. Two State District Courts have held evidentiary hearings on Petitioner's applications. The first hearing was conducted in Cause No. 10,048 in the District Court of Houston County, Texas on December 15, 1948. Petitioner was present in person and a full hearing was held with Petitioner being assisted by Mr. J. B. Sallas an attorney from Crockett, Texas. The grounds for relief urged by Petitioner were:

(1) That he was denied the right to have a medical examination of the victim made by doctors Robert Moers and Arthur Moers.

(2) That he was indicted for one offense and tried for another.

(3) That there was not substantial evidence to support the conviction.

At the conclusion of the hearing, the Court filed Findings of Fact adverse to Petitioner's claims but granted Petitioner leave to obtain a record on appeal without payment of costs.

After considering the Findings of the trial judge, the Court of Criminal Appeals denied the application on March 9, 1947. On April 20, 1949, Petitioner's Motion for Rehearing was denied. The Court's opinion is attached to this Answer and is reported as *Ex Parte Loper*, 219 S.W.2d 81 (Tex. Crim. App. 1949).

The second evidentiary hearing in the State trial court was conducted in Cause No. 61,536 in the Criminal District Court of Harris County, Texas, on July 15, 1949.

Petitioner prepared an application for habeas corpus on June 18, 1949 which he sent to the Honorable Ben W. Boyd, Judge of the 16th Judicial District Court of Denton County, Texas. Judge Boyd issued the writ and made it returnable before the Honorable Frank Williford, Judge of the Criminal District Court of Harris County, Texas. The effect of Judge Boyd's order was to cause a full hearing on Petitioner's application to be held before Judge Williford on July 14, 1949, in Cause No. 61,536 of the Criminal District Court of Harris County. Petitioner was present in person at the hearing and a number of witnesses, including Mr. Letts, Peitioner's former attorney testified. The grounds for relief urged by Petitioner were:

(1) That he was denied the right to have a preliminary hearing and to cross-examine the witnesses against him.

(2) That he was deprived the right to be confronted by the witnesses against him and to cross-examine them.

(3) That he was indicted for statutory rape and convicted of rape.

After hearing all the evidence, Judge Williford found:

(1) That Petitioner had been ably defended by Mr. Letts and Mr. Harris.

(2) That Mr. Letts had practiced criminal law principally for more than 30 years at the bar of the Court.

(3) That Mr. Harris was also experienced in criminal matters.

(4) That Petitioner had received a fair trial.

(5) That there was substantial evidence of Petitioner's guilt.

(6) That Petitioner was trying to use the Writ of Habeas Corpus as a substitute for appeal.

(7) That there was no merit to any of Petitioner's other claims.

Judge Williford, pursuant to Texas practice, certified the record and his Findings to the Court of Criminal Appeals of Texas. The Court ordered a Statement of Facts forwarded without costs to Petitioner who claimed to be a pauper. The Court of Criminal Appeals denied the application on October 12, 1949 in an opinion styled *Ex Parte Loper*, 223 S.W.2d 523 (Tex. Crim. App. 1949).

Copies of all records in the two State evidentiary hearings are attached hereto and expressly made a part hereof for all purposes.

IV.

On November 30, 1949, Petitioner escaped from Respondent's custody and remained on escape until January 20, 1951. He did not file any applications for habeas corpus during this period of time.

V.

Petitioner has showered the Court of Criminal Appeals of Texas with applications for the writ of habeas corpus which have all been denied and assigned to application file No. 59 of said court. In addition to the foregoing, Petitioner has applied for the writ of certiorari from the Supreme Court of the United States on at least three occasions and all have been denied.

VI.

Petitioner has filed at least six applications for writ of habeas corpus in the United States District Court for the Southern District. The six applications which have been given cause numbers are: (1) CA. 4563; (2) CA. 8469; (3) CA. 12,133; (4) CA. 12,226; (5) CA. 66-H-657 (present case); and (6) CA. 67-H-207.

No records are now available in Civil Action No. 4563.

In Civil Action No. 8469, Petitioner's application for writ of habeas corpus was denied by the Honorable T. M. Kennerly, United States District Judge. Upon appeal, the Court of Appeals reversed and remanded the case to the trial court for proceedings not inconsistent with its

opinion therein. The Court of Appeal's opinion is reported in *Loper* v. *Ellis*, 224 F.2d 901 (5th Cir. 1955). Upon remand the District Court dismissed the petition with prejudice on January 3, 1956 because Petitioner had failed to comply with the decision of the Court of Appeals. No further action was taken by Petitioner in Cause No. 8469. The Opinion and other records in Cause No. 8469 are attached hereto and made expressly a part hereof.

The petition in Civil Action No. 12,133 was filed on September 16, 1957. The application was denied by the Honorable Joe Ingraham, United States District Judge, on September 21, 1957. The Statement of Facts in Cause No. 58,883 in the Criminal District Court of Harris County, Texas, styled *The State of Texas* v. *Otis Loper* was attached as part of Respondent's Answer. It was, however, on August 6, 1959, released to Petitioner who has failed to return such Statement of Facts to this Honorable Court.

Civil Action No. 12,226 was begun in the Southern District of Texas on July 21, 1958 after having been transferred from the Eastern District of Texas where it had been given Civil Action No. 2526. After an evidentiary hearing on September 2, 1958, the petition was denied and the formal Order of Dismissal was entered on September 10, 1958. The Court of Appeals affirmed the judgment of the District Court in *Loper* v. *Ellis*, 263 F.2d 211 (5th Cir. 1959).

The petition filed in Civil Action No. 66-H-657 is, of course, the petition presently pending before the Court upon remand of the Fifth Circuit's opinion in *Loper* v. *Beto*, —— F.2d ——, decided October 6, 1967.

Civil Action No. 67-H-207 was filed on March 17, 1967 before the Honorable Allen B. Hannay, United States District Judge. The petition was denied on October 17, 1967 after Judge Hannay had found that the Petitioner had not exhausted his available State remedy under Article 11.07 of the Texas Code of Criminal Procedure. The record reveals that Petitioner had, in fact, exhausted all the remedies available to him in the State courts on all issues but the ones concerning the revocation of his parole.

VII.

Petitioner has filed at least six applications for writ of habeas corpus in the United States District Court for the Eastern District of Texas. These six petitions are: (1) Civil Action No. 2236; (2) Civil Action No. 2526 (Transferred to the Southern Distict); (3) Civil Action No. 2596; (4) Civil Action No. 2641; (5) Civil Action No. 2703; and (6) Civil Action No. 4458.

While no opinions or records in Civil Action Nos. 2596 and 2703 are attached to this Answer, they are considered in the other opinions rendered by the Judge of the Eastern District of Texas, the late Honorable Joe Sheehy as having been without merit and the Court took judicial notice of each of the prior proceedings in Civil Action No. 4458. The Opinions in Cause Nos. 2236, 2526, 2641 and 4458 are attached hereto and expressly made a part hereof for all purposes. Also attached to this Answer are the depositions of witnesses in Civil Action No. 2641 and the deposition of Petitioner in Civil Action No. 4458.

An examination of the opinions rendered by Judge Sheehy shows that all allegations with the exception of that concerning revocation of parole have been previously developed and have been determined to be without merit.

VIII.

Petitioner's applications for the writ of habeas corpus have time and time again been held to be without merit after a full and adequate development of the facts and evidentiary hearings conducted by both the State and Federal courts. Successive, repetitious, meritless applications need not be entertained by the Court under the authority of 28 U.S.C. Section 2244.

IX.

Petitioner has exhausted the remedies available to him in the courts of the State of Texas on all contentions except those concerning the revocation of his parole.

X.

Parole and the conditions and revocation thereof are matters of executive clemency to be determined by the Governor of the State of Texas and the Texas Board of Pardons and Paroles. No constitutional or other federally protected right of Petitioner has been violated by the revocation of his parole and no federal question is presented to this Court for determination.

XI.

Petitioner has been accorded each and every right and privilege guaranteed to him by the Constitution of the United States and by the Constitution and laws of the State of Texas.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that Petitioner's application for writ of habeas corpus be, in all things, denied.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

GEORGE M. COWDEN
First Assistant Attorney General

A. J. CARUBBI, JR.
Executive Assistant Attorney General

R. L. LATTIMORE
Assistant Attorney General

HOWARD M. FENDER
Assistant Attorney General

/s/ Thomas F. Keever
THOMAS F. KEEVER
Assistant Attorney General

[Certificate Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Title Omitted in Printing]

[REPORTER'S TRANSCRIPT OF PROCEEDINGS—DIRECT TESTIMONY OF OTIS LOPER, p. 38]

* * * * *

[fol. 38] Q All right, sir. Now, the statement of facts of the trial, Mr. Loper, reveal that the state was allowed to cross-examine you concerning certain prior convictions, [fol. 39] and I would like to ask you a few questions about those, if I may.

A Yes, sir.

Q Were you convicted in 1931 of burglary in Scott County, Mississippi?

A Yes, sir.

Q How old were you at this time?

A I don't remember, but I believe I was around 17 years, something around that age. I'm not for sure.

Q Were you represented by an attorney in connection with that proceedings?

A No, sir, I didn't have an attorney.

Q Were you advised that you had a right to an attorney whether you could afford one or not?

A No, sir.

Q Did you know that you were entitled to one whether you could afford one or not?

A No, sir.

Q Did you inform the court that you did not want to be represented by an attorney?

A No, sir.

Q Were you convicted in that proceeding?

A Yes, sir.

Q Were you convicted, Mr. Loper, of burglary in 1940 in Leake County, Mississippi?

[fol. 40] A Yes, sir.

Q How old were you at the time that occurred?

A I believe I was about 25 or 26, I don't remember for sure.

Q Let me ask you one more question about that Scott County, Mississippi, conviction. Did you plead guilty or not guilty?

A I plead guilty.

Q Were you sentenced to a term in prison?

A Yes, sir.

Q All right, sir. Now, in connection with the 1940 conviction, were you represented by an attorney?

A No, sir.

Q At any stage of the proceedings?

A No, sir.

Q Were you advised that you had a right to an attorney whether you could afford one or not?

A No, sir.

Q Could you in fact afford one?

A I don't believe I could have then.

Q What about 1931, the conviction in Scott County, Mississippi, could you have afforded an attorney?

A I couldn't have, no, sir.

Q Did you know in connection with the 1940 proceeding that you were entitled to be represented by counsel whether you could afford it or not?

[fol. 41] A No, sir.

Q Did you inform the court that you did not want to be represented by an attorney?

A No, sir.

Q Was the 1940 proceeding in Leake County, Mississippi, did you plead guilty or not guilty?

A Not guilty.

Q Was a trial held?

A Yes, sir.

Q Who conducted the defense in that trial?

A Well, there wasn't anybody. I just didn't know what to ask the people. I didn't know anything about how to.

Q Did you conduct your own trial?

A As far as it was conducted, yes, sir.

Q Why did you attempt to do so yourself?

A Well, I didn't have an attorney, and nobody to help me. I didn't want to plead guilty to it.

* * * *

[REPORTER'S TRANSCRIPT OF PROCEEDINGS—DIRECT EXAMINATION OF RESPONDENT'S WITNESS L. D. HARRIS, p. 97]

* * * * *

[fol. 97] A Yes. I appeared in the trial of the case, and the District Attorney offered Mr. Loper ten years on a plea of guilty. He refused to plead guilty, over Jim Letts' recommendation. And then during the trial, I objected to several things, and especially the testimony in regard to details referring to Mr. Loper's past record. I asked the Judge to approach the bench, and we—Mr. Letts and I and the District Attorney, Assistant District Attorney and the Judge, had a conversation. And I told him that there wasn't a certified copy of the judgments [fol. 98] in, that had been introduced in the record. I didn't see any judgments, and that the law, in my opinion, gives the District Attorney the right to ask the defendant if he had been convicted in this state or any other state in the last ten years for a felony—

THE COURT: Or a misdemeanor involving moral turpitude?

A (Continuing)—or a misdemeanor involving moral turpitude.

THE COURT: And he is supposed to answer yes or not.

A (Continuing) And if he answered that question in the affirmative, that that is as far as the District Attorney or any other attorney asking that question could go. And Judge Williford overruled me, "I know what is good evidence and what is not, so we will just go ahead." And then, when the case was at a—

THE COURT: Now finish, Mr. Harris, what happened after that? The District Attorney asked Loper—

A He asked Mr. Loper about each and every conviction in detail. Burglary in 1953, we will say, and you were convicted of a robbery or something else on another [fol. 99] date, and the only time that I know of that he could have asked those questions is if Mr. Loper had denied that he had ever been convicted. But he didn't deny it. He said that he had been convicted of crimes.

THE COURT: So your real complaint insofar as the

point of law is concerned, was that, if I understand you after Loper admitted that he had been convicted of whatever it was, a felony, he, the Judge, the trial Judge, permitted the District Attorney to go into what they were for and what date and that sort of thing?

A Yes, sir.

THE COURT: I see. I understand.

Thank you. You go ahead.

* * * *

[REPORTER'S TRANSCRIPT OF PROCEEDINGS—DIRECT TESTIMONY OF RESPONDENT'S WITNESS L. D. HARRIS, p. 111]

* * * *

[fol. 111] Q What kind of trial attorney, or do you know, was Mr. Letts?

A Well, you have classifications with perhaps Percy Foreman at the top, and in my opinion, Jim Letts was a better attorney than Percy Foreman, as far as trial work is concerned. He had the ability to turn on what we call crocodile tears, and he could cry a verdict out of a jury better than anybody I have ever seen. And he was a good attorney as far as—

THE COURT: He was certainly an experienced lawyer and tried a great many cases in the Harris County Courthouse?

* * * *

[REPORTER'S TRANSCRIPT OF PROCEEDINGS—CROSS EXAMINATION OF RESPONDENT'S WITNESS L. D. HARRIS—page 118]

* * * *

[fol. 118] Q Do you recall Mr. Letts at the trial say that Betty Fay Darti was the only witness for the state placing the defendant as being the one who committed the offense?

A Yes, sir, and I thought it was very flimsy evidence.

* * * *

Cause No. 58,883

IN THE CRIMINAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS
NOVEMBER TERM, A. D. 1947

THE STATE OF TEXAS

vs.

OTIS LOPER

STATEMENT OF FACTS

Philip B. Smith
Court Reporter
Criminal District Court
Harris County, Texas

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Cause No. 58,888

IN THE CRIMINAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS
NOVEMBER TERM, A. D. 1947

THE STATE OF TEXAS

vs.

OTIS LOPER

BE IT REMEMBERED, that upon this the 17th day of November, A. D. 1947, the above numbered and entitled cause coming on for trial, upon regular call of the docket, before the HON. FRANK WILLIFORD, JR., JUDGE OF SAID COURT, and all parties having appeared in person, and by their respective counsel, and having announced ready for trial, the following evidence was adduced and facts proven, to-wit:

APPEARANCES

FOR THE STATE:

Mr. E. B. Duggan
and
Mr. J. H. Meyers,
Assistant Criminal District Attorneys.

FOR DEFENDANT:

Mr. J. H. Letts
and
Mr. L. D. Harris,
Houston, Texas.

[fol. 2]

BETTY FAY DARTY,

called as a witness on behalf of the STATE, and after having been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Duggan

Q Your name is Betty Fay Darty?
A Yes sir.
Q How old are you, Betty Fay?
A I am eight years old.
Q Do you go to school?
A Yes sir.
Q What grade are you in?
A I am in the 3rd grade.
Q Do you go to Sunday school?
A Yes sir.
Q Do you know the difference between telling the truth and telling a story, or an untruth?
A Yes, I do.
Q What happens to you when you tell a story?
A I would go to the devil.
Q Now, how old did you say you were, Betty Fay?
A Eight.
Q And do you know Otis Loper, the Defendant there, seated at the counsel table?
[fol. 3] A Yes, I know him.
Q And what relation is the Defendant, Otis Loper, to you?
A What do you mean?
Q Is he your father or your stepfather?
A He is my step-father.
Q How long has he been your stepfather that you know about, the best you can remember?
A I don't remember.
Q What place or State did you come from when you came here to live in Houston?
A Sumiton, Alabama.
Q And you came over here to be with your mother?
A Yes sir.

MR. LETTS: Your honor, we object to counsel leading the witness.

THE COURT: Objection over-ruled.

MR. LETTS: Note our exception.

(The above is defendant's Bill of Exception No. 1)

Q When you came here to Houston to live with your mother, did you see this defendant, Otis Loper?

A Yes sir.

Q Had you ever seen him before that time?

A Yes, when he and my mother came out there to visit my grandmother.

[fol. 4] Q Your mother and this defendant, Otis Loper, came to Alabama to visit your grandmother and with whom you were staying with there in Alabama?

A Yes sir.

Q And then later you came to Houston to live with your mother here?

A Yes sir.

MR. LETTS: We object, your honor, as that is leading and suggestive and repetitious.

THE COURT: Yes, don't repeat, please.

Q Betty Fay, do you recall the date of August 9th, 1947, on or about that date, soon after you came to Houston here?

A I don't know exactly when I came out here, but I think that time was about when I came out here.

Q You were living here in Houston on or about that date?

A Yes sir.

Q Did something bad happen to you, Betty Fay, at that time?

A Yes sir.

Q And that was on or about the 9th day of August, 1947?

A Yes, I think so.

Q What day of the week was that, if you know, or remember, Betty Fay?

A That was a Saturday.

Q Where were you on that Saturday?

[fol. 5] A At home.

Q Who was there with you at home at that time?.

A My step-father, Otis Loper, and my little brother.

Q How old is your little brother?

A I guess he was about six or eight months old.

Q He was just a baby?

A Yes sir.

Q Where was your mother at that time?

A She and Mrs. Baker, a neighbor, had gone out—they went to the grocery store.

Q If you recall, Betty Fay, about what time was that on that Saturday morning did your mother and Mrs. Baker go to the grocery store?

A It was between eleven o'clock and something.

Q It was on the morning of that Saturday morning after eleven o'clock?

A Yes, it was in the morning.

Q And she left you there at home with this defendant, Otis Loper, and your little baby brother?

A Yes sir.

Q At that time what, if anything, did this defendant, your step-father, do to you?

A He stuck his finger up me.

Q He stuck his finger up you, what do you mean by up you, do you know what I mean when I say your private parts?

A Yes sir.

Q Did he stick his finger up in your private parts?

A Yes sir.

Q What did you do when he did that?

A I screamed.

Q And when you screamed, what did this defendant, Otis Loper, do?

A He stuck his nasty thing up me.

Q Do you know what I mean when I talk about this defendant's private parts?

A Yes sir.

Q Did he put his private parts in your private parts, Betty Fay?

A Yes, he did.

Q Did he hurt you when he did that, Betty Fay?

A Yes sir.

Q What did you do when this defendant, Otis Loper, put his private parts up in your private parts, Betty Fay?

A He hurt me.

Q What did you do?

A I screamed.

Q And did he finally get off of you?

A Yes. I kept screaming until he finally got off of me.

Q How long did the defendant have his private parts in your private parts?

MR. LETTS: We object to that question, your honor, as it is highly prejudicial and inflammatory to the jury.

THE COURT: Objection over-ruled.

MR. LETTS: Note our exception.

(The above is defendant's bill of exception No. 2)

A I don't know.

Q Where, in what room in the house, did the defendant put his private parts in your private parts?

A In the bedroom.

Q Where was it in the bedroom, was it on the floor or on the bed?

A On the bed.

Q Did you bleed from your private parts during or after he had his private parts in your private parts?

A Yes sir.

Q Did you bleed very much?

A Yes, I did.

Q Later, after this was over, Betty Fay, where did you go, if any place?

A I didn't go no where, but he went outdoors in the yard. I went outside in the yard later.

[fol. 8] Q Why did you go out in the yard—where was the bathroom there, Betty Fay, in the yard or in the house?

A It was in the backyard.

Q And when you went outside in the yard, did you go to the bathroom?

A Yes sir.

Q Later on during that day did you go anywhere; did you leave the house?

A I went to the hospital.

Q What hospital did you go to?

A I went to the Jeff Davis Hospital.

Q And did some doctor examine you there at the Jefferson Davis Hospital?

A Yes, he checked me.

Q Where did he check you, on what part of your body; did he check you where you were hurt?

A Yes sir.

MR. LETTS: Your honor, that is leading and suggestive, and we object to it if the Court, please.

THE COURT: Objection over-ruled.

MR. LETTS: Note our exception.

(The above is defendant's bill of exception No. 8)

Q How long did you stay in the hospital?

A Just a little while.

[fol. 9] Q Then where did you go, Betty Fay?

A I came over here.

Q You came over here to the Sheriff's Office that is located in this building?

A Yes sir.

Q And after you left the Sheriff's Office where did you go, Betty Fay?

A I went home.

Q And where is your home located?

A 801 Whitney Drive, Houston.

Q And where are you living now?

A I don't know—my mother, she moved away from there.

Q You have been staying out at the Mary Burnett School for Girls here in Houston?

A Yes sir.

Q When was the last time you saw your mother?

A The Sunday they let her out of jail.

Q That was the last time you have seen her?

A Yes, and since my little brother died, too.

Q Do you know where your mother is now?

A No sir.

Q You are not the wife of this defendant, Otis Loper, are you, Betty Fay?

A No, I am not.

[fol. 10] Q And this, what you have just told us, happened here in Houston, Harris County, Texas?

A Yes, in Houston here.

Q And it happened where you were living with your mother out on Whitney Drive, which is here in Houston, Harris County, Texas?

A Yes sir.

MR. DUGGAN: That's all the questions I have, your honor.

CROSS EXAMINATION

Questions by Mr. Letts.

Q You are Betty Fay Darty?

A Yes.

Q What is your mother's first name, Betty Fay?

A Willette.

Q Where was she born, if you know?

A I don't know.

Q Where were you born?

A I guess I was born in Carman Hill.

Q Where is that, in Mississippi or Alabama?

A Alabama.

Q How old are you, Betty Fay?

A Eight years old.

[fol. 11] Q When were you 8 years old?

A I was 8 on January 26th.

Q How long did you live in Alabama with your uncle and aunt?

A I lived with my grandmother and grandfather.

Q How long did you live with them?

A I guess about three or four years.

Q Who did you live with after you lived with your grandparents?

A My mother and stepfather.

Q What stepfather, the defendant here, Otis Loper?

A Yes sir.

Q. Did you ever live with a man by the name of Willis?

A Yes sir.

Q Your mother and you lived with him?

A Yes sir. He is dead now.

Q How long did you live with them?

A As much as I lived with my grandmother. He, Mr. Willis, lived with my grandmother and I lived there with them when I was a baby.

Q You were hurt in Alabama, weren't you?

A Yes, I guess I was.

Q Did you fall on something and hurt yourself while you were in Alabama?

A No, I didn't fall on anything but I was afraid my [fol. 12] mother would spank me if I told her the truth.

Q What did you tell her?

A I told her I fell on a stick of wood.

Q Tell us what did happen—why didn't you tell your mother?

A I didn't tell them because I was afraid of my stepfather and my mother.

Q And what stepfather was that, Mr. Willis?

A No, Otis Loper.

Q And what did he do then, if anything?

A He didn't do anything to me after I told my mother I fell on a stick of wood, and I also told my grandmother.

Q Why did you tell your grandparents you fell on a stick of wood?

A Because I was afraid of my mother and my stepfather. I was afraid my mother would spank me.

Q What did he do to you?

A He stuck his finger up me and put his nasty old thing in me.

Q How old were you then?

A I was 8 years old the last time he did it.

Q The last time he did it you were 8 years old?

A Yes.

Q And at the time were you living with your father that is dead now?

A No, when he did it then he wasn't there; he was dead.

[fol. 13] Q What was your grandfather's name?
A I don't know. He never told me what his name was.
Q How long did you live with your grandmother and your grandfather?
A About 3 or 4 years.
Q And where have you been since the time this first assault took place; have you been living here in Houston?
A The first time was in Alabama when I was living with my grandparents and the second one was here in Houston when I was living with my mother and Otis Loper, and I am living at the Mary Burnett School now.
Q Have you talked to anyone about this case?
A I have talked to them here.
Q Did you tell anyone in the Probation Department about this case?
A Yes. I told the lady that brought me out here.
Q What did she tell you to say?
A She told me to tell the truth.
Q To tell the truth, that is what she told you?
A Yes sir.
Q Didn't she tell you anything else?
A No sir.
Q She just told you only to tell the truth about it?
A Yes sir.
[fol. 14] Q Didn't she say anything else?
A She asked me some questions about it like the ones asked me here.
Q And you told her all about it?
A Yes sir.
Q What was the doctor's name that examined you at the Jeff Davis Hospital?
A I don't know.
Q You haven't seen him here today?
A No sir.
Q Now, tell this Jury and turn around and face them so they can get your facial expression and answer this question, didn't they tell you to tell here in court that your stepfather put his nasty thing in you?
A No sir.

Q They didn't tell you to take this witness stand and say that to the Jury?

A No. They told me to tell the truth.

Q They didn't tell you to say your stepfather put his nasty thing in you?

A No, they didn't.

MR. DUGGAN: Your honor, she has answered that two or three times; she said they told her to tell the truth.

[fol. 15] THE COURT: Yes, that's right, but this is cross-examination.

MR. DUGGAN: Yes, your honor.

Q Who told you this happened on August 9th?

A I guess this lady did that other time when I came down here. I don't know her name, and I didn't know it was on August 9th.

Q About four or five days before this defendant, your stepfather, was arrested did your mother have any trouble with your step-father?

MR. DUGGAN: I object to that question, your honor, unless counsel can show what connection that has with this case.

MR. LETTS: I will show that later, your honor.

THE COURT: I am not going to permit you to do it. Objection sustained.

MR. LETTS: Note our exception.

THE COURT: Yes sir.

(The above is defendant's bill of exception No. 4)

Q On August 9th, your mother, stepfather and little brother were at home there along with you?

A My mother and Mrs. Baker had gone to the store. They weren't there. My stepfather was there with me and my little brother.

[fol. 16] Q On August 9th around 8:30 or 9:00 A.M. your stepfather and mother and Mrs. Baker were at home there, isn't that right?

A Not my father. He went to town. No, he went to town later.

Q And Mrs. Baker and your mother went to the store for groceries?

A Yes sir.

Q And they were gone about an hour?
A Yes sir.
Q And when they came back your stepfather, you and the little baby brother were at home?
A Yes sir.
Q I ask you whether or not you left the house and ran up the drive-way to meet your mother when she was coming in and you asked her whether or not she brought you some candy and ice-cream, did you do that?
A No, because she didn't have enough money to buy ice cream and candy; she just bought groceries.
Q And you helped your stepfather and your mother bring the stuff in the house?
A Yes sir.
Q You wasn't crying then, were you?
A No sir.
Q You were out in the yard playing when your mother came home, weren't you?
[fol. 17] A Yes, I was out in the yard when my mother came home.
Q And your stepfather walked out with you and assisted you and your mother with the groceries?
A Yes sir.
Q You never told your mother anything about it at that time, did you?
A No, I didn't say anything about what my stepfather did to me until my mother said she was going to call the law and I knew they wouldn't hurt me.
Q What did you tell your mother and Mrs. Baker when they first drove up?
A I didn't tell her nothing. I was hurting and I went to the bathroom and she asked me why I was going to the bathroom so much and I told my mother I was hurting and where I was hurting.
Q At that time you were not crying?
A No, sir.
Q You helped your stepfather take the groceries in the house and after you, your mother and stepfather got in the house did your mother and stepfather get into an argument?
A No, sir, my step-father went to town.

Q Your stepfather went to town in the afternoon?

A Yes, sir, after he got the stuff in the house he went to town.

[fol. 18] Q What did your mother do later on that afternoon?

A She was still in the courthouse here.

Q And you were at home?

A No, me and my mother came over here from the hospital; she brought me over here.

Q And nothing was said between your mother and stepfather while Mrs. Baker was there after the groceries were taken in the house?

A No. Only my mother gave me some peaches.

Q How long was it after your stepfather was gone to town that you and your mother left the house?

A When she found out she told me to get ready to go.

Q After she found out what?

A That I was bleeding. She told Mrs. Baker to take care of the baby while me and her came down to the hospital.

Q When you went to the hospital with your mother did a doctor over there examine you?

A Yes sir.

Q And didn't he tell you there in the presence of your mother that nothing was the matter with you?

A He told my mother there was a split.

Q That what was split?

A Whatever you call it; I don't know.

Q Then you and your mother got in an automobile [fol. 19] and went where?

A You see we went to the hospital first and then we came here. After my mother found out about where I was hurting we went to the hospital and then we came over here.

Q You came from the hospital directly over here?

A Yes, sir. After she found out we went to the hospital and then came here to this building.

Q Your mother and you then went home with some officers?

A Yes sir.

Q That was how late in the afternoon?
A About four.
Q Four o'clock in the afternoon?
A Yes sir.
Q Your father was on his way home then?
A Yes, I guess so.
Q And it was about four blocks away from your home where he was arrested?
A Yes sir.
Q You and your mother got out of the car and walked home?
A Yes sir.
Q That was on Saturday afternoon around five o'clock?
A Yes sir.
Q On Sunday, the following day, what did you do?
A I don't know. I have forgotten now. I told my mother to get me some ice cream, and I asked my mother to take me to Sunday School. My mother said she couldn't get me any ice cream because she didn't have any money. I could hear them singing at the church and I asked my mother to take me to Sunday School and she said she didn't have any money.
Q On Monday, did you not go to where your father worked, you and your mother?
A I hadn't got to see my father since he was put in jail.
Q Just you and your mother went down on Commerce Street, didn't you?
A Yes sir.
Q What did you go down there for?
A They took me and my mother. They put me in the Mary Burnett School for Girls and they put my mother in jail.
Q They put your mother in jail that Monday?
A Yes sir. Mrs. Baker and my mother had a fight. My mother beat Mrs. Baker up.
Q Do you know a girl by the name of Beatrice Mae McGee?
A Mr. and Mrs. McGee?
Q Yes?
A Yes, my mother and I went to visit them sometimes.

Q Mr. McGee, you have seen him there at your house?
A Yes, we went to visit them at his house.
Q Where did you go after you met Mr. McGee?
[fol. 21] MR. DUGGAN: I object to that, your honor, as it is irrelevant and immaterial to this case.
THE COURT: That's right, you have a fight that happened 3 or 4 days after and now you are trying to bring something else in, Mr. Letts. Objection sustained.
MR. LETTS: I take exception to the Court's ruling.

(The above is defendant's bill of exception No. 5)

Q Isn't it a fact that your mother put you up to telling this on your stepfather and you are doing it here today for your mother?
A No, sir, that is not so. My mother didn't tell me nothing to say. She was trying to find out about it when she first found out I was hurt, and that is when I told her I was bleeding.
Q Your mother is not here today?
A No sir.
Q You don't know where she is, do you?
A No sir.
Q She hasn't been out to this home where you are living to see you since this happened, has she?
[fol. 22] A She came out to see me once and when my little brother died I saw her at the funeral.
Q Didn't this happen, wasn't your stepfather and mother in an argument 3 or 4 days before this happened and your stepfather slapped your mother?
MR. DUGGAN: I object to that, your honor, as it is irrelevant and imaterial to this case.
THE COURT: Objection sustained.
MR. LETTS: Note our exception, your honor.

(The above is defendant's bill of exception No. 6)

MR. LETTS: That' all, no further questions.
MR. DUGGAN: I have no further questions.

DR. F. B. WELLER,

called as a witness on behalf of the STATE, and after having been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Duggan.

Q You are Dr. F. B. Weller?
A Yes, sir.
Q You are a graduate of what meidcal school, doctor?
A I graduated from the University of Louisville Medical School at Louisville, Kenutcky.
[fol. 23] Q When was that, doctor?
A In 1946.
Q Are you a licensed and practicing physician here in Houston, Harris County, Texas?
A Yes sir.
Q How long have you been a licensed and practicing physician here in Harris County and the State of Texas, doctor?
A Since June of this year when I finished my interne work here in Houston at the Jefferson Davis Hospital.
Q Are you still there at the Jefferson Davis Hospital?
A Yes, sir, I have been there since June.
Q On or about the 9th day of August, this year, 1947, doctor, did you have occasion to examine a little girl by the name of Betty Fay Darty, the little girl who just left the witness stand?
A Yes sir.
Q State, approximately, doctor, just what time of the day or night did you examine her?
A It must have been around 3:00 P.M.
Q Three o'clock in the afternoon?
A Yes sir, about that time.
Q Did you make a thorough examination of her private parts, doctor?
A Yes, I did.
[fol. 24] Q Dr. Weller, as these gentlemen here on the Jury are laymen, could you tell them in plain terms just what you found was the matter with the little girl, Betty Fay Darty, when you examined her?

A Yes. You just want what I found in my physical examination of her?

Q Yes?

A Well, the outer parts of the child's privates, meaning the vagina and the lips of the vagina were blood tinged, and so were the interior parts of her vagina. The opening of her vagina was stretched evenly around and it was blood tinged. At the end of the vagina canal, there is the cervix uteri, which is the neck of the uterus which opens into the womb, and the cervix uteri had blood on it and it was inflated and tender. The cervix canal was stretched evenly all the way back to the womb. There were no jagged cuts or tears on either the vagina or cervix, but they were stretched and bloody. Her hymen was all broken, or torn out, and that is about all.

Q The hymen and the cervix uteri are just back of the vaginal opening, is that right?

A Yes, sir.

Q That is commonly known to be the opening of the vagina, the hymen, isn't it? Can you explain the hymen for us?

[fol. 25] A Yes. The hymen is a thin membrane that you can nearly see through which is located just back in the vagina and in this case there was no hymen.

Q In other words, the hymen was completely torn out?

A Yes, it must have been.

Q And you say that even the opening to the womb was blood tinged?

A Yes sir.

Q Something had penetrated her privates as far as the physical part of her body there would permit it?

A Yes sir, but . . .

MR. LETTS: We object to that, your honor, as it is asked to inflame the minds of the Jury.

THE COURT: Objection over-ruled.

MR. LETTS: Note our exception.

(The above is defendant's bill of exception No. 7)

Q Go ahead, doctor, continue your answer to the question?

A The lips of the cervix canal, which is the opening to the womb, had blood on it, and the walls of the vagina

and cervix were stretched, tender and inflated. To have blood at the opening of the womb does not mean, however, that something had penetrated that far. It could have been but to have blood on those interior parts it could have meant the heavy blood on the outside caused it to [fol. 26] be tinged on the inside.

Q How about the walls of the vagina?

A The walls of the vagina were stretched, tender and inflated.

Q How far back did that condition exist, doctor?

A That is hard to say because, as you understand, in children the length of the vagina and cervix wouldn't be over one and a half inches and I would hesitate to say how far back it was stretched, or irritated.

Q Could you determine from your examination of her whether the injury was a fresh one or an old one?

A They seemed to be fresh injuries.

Q And that condition of her private parts could have been caused by the penetration of a male organ, could it not, doctor?

A Yes, it could have.

Q You made this examination of this little girl, Betty Fay Darty, here in Harris County, didn't you, doctor?

A Yes sir.

MR. DUGGAN: That's all, thank you, doctor.

CROSS EXAMINATION

Questions by Mr. Letts.

Q When was she brought there to the Jeff Davis hos- [fol. 27] pital for you to examine, doctor?

A My record here shows that I examined her at 2:45 P.M. on the 9th day of August, 1947.

Q Now, doctor, upon your examination of this little girl, which you have just explained to the jury, can you tell the jury whether or not her hymen was broken?

A I saw no hymen in this child at all.

Q Didn't you find any of the hymen flesh, or fragments of it, remaining there?

A No, I did not.

Q Now, a finger of a person could cause that condition, couldn't it?

A Yes, it could.

Q In a child of that age don't you sometimes find the vagina raw or swollen where on occasions they use themselves, you know what I mean, don't you, doctor?

A I have seen no series, meaning a good many cases, on that, but I will say that a small percentage of children may use themselves but that would be pretty young at her age to do it—it would be quite young, but it could be possible.

Q Did you meet the mother of this little girl at the time she brought the child over to the hospital?

A I believe I met the mother. There was a lady there with the child, and I believe she was the mother, but I [fol. 28] am not sure as I don't remember.

Q Did the mother of this little girl appear to be excited, or anything like that?

A No, she didn't seem to be excited at that time, in fact, you would be surprised at the number of those kind of cases that we have here. They are quite common at times.

Q You are not telling this jury that it was a penis that penetrated that little girl and tore out the hymen, are you?

A They asked me if it could have been and I said it could have been a male organ that did it.

Q It could have been a finger, too, couldn't it—you are not telling this jury it was a penis, are you?

A No, I cannot say that positively.

MR. LETTS: That's all, thank you, doctor.

MR. DUGGAN: No more questions.

THE STATE RESTS, YOUR HONOR.

MR. LETTS: Your Honor, the Defendant wants his wife, Willette Loper, who we subpoened, here to testify in his behalf.

THE COURT: Is she here now?

MR. LETTS: No, she hasn't appeared, but I think we can get her if given time.

THE COURT: If she isn't here we can't wait for you to get her.

MR. LOPER: Judge, I want my wife here to testify, she was (Defendant) subpoened to be here.

THE COURT: No, this trial has to go on if she isn't here.

MR. LETTS: Note our exception, Your Honor.

MR. OTIS LOPER, THE DEFENDANT,

took the witness stand in his own behalf, and after having been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Letts.

Q What is your full name?
A Otis Milton Loper.
[fol. 29] Q Mr. Loper, how old are you?
A I am 34 years old.
Q When were you born?
A In 1913.
Q What is your native State?
A Mississippi.
Q How long have you been living here in Texas?
A I came to Texas last November.
Q Who did you come here with?
A My wife.
Q How long had you been married previous to the time you came to Texas?
A We got married in 1945.
Q Did you come directly to Houston, Texas, then?
A No, sir.
Q Where did you live before you came here?
A I lived in Philadelphia, Mississippi, and then I moved to Jackson, Mississippi, and lived ther for awhile and then I moved to Hattiesburg, Mississippi, and lived there for awhile, and then we moved to Louisiana where I worked in the oil fields for awhile, and then we moved back to Mississippi.
Q How long have you been in Houston?
A About a year. We came here last November.
Q Who came with you?

[fol. 30] A Just my wife.

Q Did your step-daughter come with you at that time?

A No sir.

Q When did she come here to Houston?

A We went and got her in June, but I don't remember the date.

Q Last year or this year?

A This year.

Q Where did you live here in Houston?

A 801 Whitney Drive.

Q How long have you lived there, or when did you move there?

A Last December.

Q While you were living there was any children born to you and Mrs. Loper?

A Yes, a boy.

Q Your wife went to Mississippi and got this young girl and brought her back here?

A She went to Alabama.

Q And brought her back to Houston?

A Yes sir.

Q Where were you working at that time?

A For Swift & Company at 1102 Commerce Street.

Q It is charged here that on or about the 9th day of August, 1947, you committed as assault upon your step-daughter, Betty Fay, who is 8 years old, will you tell [fol. 31] us what happened, in your own words?

MR. MEYERS: Your honor, we object to that in narrative form, and would like for his counsel to interrogate him in question and answer form.

THE COURT: Objection sustained; interrogate him, Mr. Letts.

MR. LETTS: All right, your honor.

Q Were you at home on August 9th, 1947?

A Yes, sir.

Q Who was with you?

A My wife. She got up at eight o'clock and went to the grocery store with Mrs. Baker. She was back at nine o'clock. She fed the baby before she left. When my wife left the house and went to the grocery store with Mrs. Baker I was left at home there with my little baby boy,

who was about 4 months old, and the little girl, Betty Fay Darty, was there. My wife fed the baby before she left and the baby wouldn't hardly suck the bottle of milk; he was crying.

THE COURT: Interrogate your witness, Mr. Letts.

MR. LETTS: He is telling what happened, your honor.

THE COURT: All right, but interrogate him.

Q You say that the baby was crying and your wife had gone to the store with Mrs. Baker?

[fol. 32] A That's right.

Q How long had they been gone when they got back home?

A About an hour.

Q Where did they go, did they go to more than one place?

A I really don't know.

Q What happened upon their return from where-ever they went?

A When they got back the little girl ran out of the house and met her mother as usual and wanted to know if she had brought her some ice cream and candy. I had given my wife enough money to buy that extra stuff, but she didn't buy the ice cream and candy.

Q Did you help your wife unload the groceries?

A Yes, and there was some big boxes in there and I told her they were too big for her to carry but she lifted some of them anyhow.

Q But you took most of the groceries into the house, you carried them in there?

A Yes sir.

Q What happened after you took the groceries into the house, did you and your wife have an argument?

MR. DUGGAN: We object to that your honor, as that is a leading and suggestive question.

THE COURT: Objection over-ruled.

A Yes, we didn't get along very good; we did have an argument.

[fol. 33] Q What was said in that argument between you and your wife, Mr. Loper?

A My wife got mad at me because I didn't clean up the house while she was gone.

Q Your wife got mad at you for not cleaning up the house?

A She sure did.

Q While your wife was gone did you, at any time, assault that little girl, Betty Fay Darty?

A No, I did not. I didn't stay in the house hardly at all with her during the time my wife was gone. I took the baby boy out in the back yard to try and stop him from crying and to take care of him until my wife came back.

Q Has your wife tried, at different times during your marriage, to send you to the penitentiary, or threatened to try and send you to the penitentiary?

A Yes. She threatened to have me put in jail several times, and one time at the S.Y.S. Food Market when I left her there, and Mr. Smith, who works there, can verify that statement.

Q Do you know a man named McGee?

A Yes sir, Arch McGee.

Q Has this Mr. McGee been visiting your house, and if so, how long?

A His son has.

[fol. 34] Q This Mr. McGee's son had been visiting in your home?

A Yes.

Q How old is his son?

A About 14 or 15 years old.

Q Did this McGee boy take the little girl, Betty Fay, over to his house?

A Yes, he did.

Q Did you see this 14 year old McGee boy and Betty Fay together often?

A Yes, I saw them together quite often.

Q Did you remonstrate with your wife about her actions in letting the little girl go over to the McGee boy's house?

A Yes, I did.

MR. DUGGAN: Your honor, we object to that as being immaterial to this case.

THE COURT: Yes, what is the materiality, Mr. Letts.

MR. LETTS: It is, your Honor, to show what caused the trouble between the defendant and his wife that would cause her to . . .

THE COURT: Mr. Letts, let's confine the testimony to this matter of the charge, this matter which is on trial.

MR. LETTS: Yes, your honor.

Q Was your child, your baby boy, crying at the time [fol. 35] you went out to the car in the drive-way when your wife and Mrs. Baker came in from the grocery store?

A Yes.

Q Was the little girl crying when your wife drove up there about nine o'clock with the groceries?

A No.

Q And she went out to see her mother when she came in with the groceries?

A Yes sir, she ran out a little sooner.

Q When you were taken to jail your step-daughter was left there at the house with the little baby boy?

A Yes, they were left there with my wife.

Q The little girl was left with your wife that morning, wasn't she?

A I don't understand your question.

Q Your wife went to town, or to the grocery store somewhere, with Mrs. Baker, didn't she?

A Yes sir.

Q And she came back home, didn't she?

A Yes sir.

Q When your wife came back home with Mrs. Baker did the child, the little girl, go out to the car with you?

A Yes sir, she went ahead of me.

Q And later on your little step-daughter and your [fol. 36] wife went to town, isn't that right?

A That was what I was told, as I left there first.

Q They went to the Jefferson Davis Hospital, didn't they?

A Yes.

MR. DUGGAN: We object to that, your honor, as it is hearsay.

THE COURT: Objection sustained.

Q When were you arrested?

A It was around about five-thirty or six-thirty o'clock in the evening on August 9th.

Q Who was with the officers at the time you were arrested, Mr. Loper?

A My wife and the little girl, Betty Fay.

Q When you were arrested by the police officers, how far were you from your home at that time?

A About 4 blocks.

Q Did your wife go with you and the officers when you were arrested, or did she get out of the car and go with the little girl?

A She got out of the car and went with the little girl towards home.

MR. LETTS: That's all I have, your honor.

CROSS EXAMINATION

Questions by Mr. Duggan.

[fol. 37] Q Loper, you say your wife and Mrs. Baker left you there at home with the little 8 year old stepdaughter and the little baby boy?

A Yes sir.

Q At the time they left you there with Betty Fay Darty, was there anything wrong with her—nothing was wrong with her then, was there?

A There was nothing wrong with her at any time.

Q She wasn't bleeding from her privates at any time while she was there in your care?

A Personally, I couldn't say.

Q Wasn't there any blood on her privates?

A I don't know.

Q You lived there in a garage apartment back of 801 Whitney Drive, didn't you?

A Yes sir.

Q How far is that garage apartment from the houses on either side of it?

A I don't know exactly. There is a house across the street in front of this other house at 801 Whitney.

Q You were in the garage apartment and how far is that from the nearest house, or how far back is it from the street?

A About 125 feet, I would say, approximately.

Q You have one bedroom in that garage apartment?

[fol. 38] A Yes sir.

Q And did all 4 of you sleep in there, you, your wife, baby and Betty Fay?

A Yes sir.

Q You all slept in that one bedroom?

A Yes.

Q And there was no blood on the sheet of that bed that morning?

A No.

Q And your wife left for the store with Mrs. Baker around nine o'clock?

A About eight o'clock.

Q And they came back about eleven o'clock that morning?

A No sir.

Q What time was it then?

A Nine o'clock.

Q And right after they came back you had occasion to leave there, didn't you?

A Not right after they got back home, no.

Q What time did you leave there?

A Around eleven o'clock.

Q You and your wife went over and visited Betty Fay when she was living with her grandparents in Alabama about a year ago, didn't you?

[fol. 39] A It has been over a year ago.

Q And didn't you molest her, or play with her private parts, on that occasion when you were in Alabama?

A No, I never have played with or touched her private parts.

Q And then Betty Fay was brought to Houston?

A Yes.

Q And she had been here about 2 months up to the time of this occurrence on August 9th?

A She came here sometime in June. I don't know the date.

Q She came in June and she had been here 2 months?

A No, she hadn't been here 2 months.

Q Hadn't you molested her on those two occasions?

A No, sir.

Q And hadn't you threatened her and told her what you would do to her if she told anyone about it?

A No.

Q You penetrated Betty Fay's private parts with your penis on that morning of August 9th, 1947, didn't you?

A No.

Q After you came to town on that morning of August 9th, you know now that Betty Fay told her mother what happened, and her mother immediately took her to the Jefferson Davis Hospital where she was examined by a doctor, and they found out what happened to her, isn't that right?

[fol. 40] A I know what I was charged with and that's all.

Q And the officers picked you up between five-thirty and six-thirty that same afternoon?

A Yes sir.

Q And you heard Betty Fay testify that the last time you molested her, she saying you put your private parts in her private parts, and soon after when her mother discovered she was hurting and bleeding, her mother took her to the hospital?

A Yes, sir.

Q You heard her say that?

A Yes.

Q And you say you never have touched her at all?

A I never have touched her privates at all.

Q You never had sexual intercourse with Betty Fay Darty?

A No sir.

Q She is a truthful child, isn't she?

A As far as I know she is.

Q Where is your wife now?

A I don't know. I have been in jail. I only know where I heard she was.

Q Don't you know that the reason your wife left you was because as soon as she knew you had raped this 8 year old child of hers, she left you?

[fol. 41] MR. LETTS: Your honor, I object to that.

THE COURT: Over-ruled, this is cross-examination, Mr. Letts.

Q You know that is the reason your wife left you and refused to live with you, because you raped her 8 year old daughter, isn't that right?

A No, sir, that is not the reason she left me.

Q You can't give me the reason she left you, can you?

A I think I can.

Q What is the reason?

A She had been going to beer parlors here in town all the time with men.

Q When?

A When I was in jail.

Q She didn't do that before you were put in jail?

A I don't know. I was at work.

Q Didn't your wife confront you with her little girl, Betty Fay, and accuse you of this crime you are charged with?

A No sir.

Q You know that she can testify for you, don't you?

A I don't know whether she could or not.

Q During the past ten years how many times have you been indicted and convicted in this State or any other State for a felony?

[fol. 42] A About twice in the past ten years.

Q How about on May 7th, 1940, weren't you arrested . . .

MR. LETTS: Your honor, I object to that, as to his being arrested, as that is not admissible in this case.

THE COURT: Well, let him finish the question, Mr. Letts.

Q All right, On May 7th, 1940, what were you indicted and convicted for?

A Burglary.

Q Where was that?

A Carthage, Mississippi.

Q What did you get for that?

A Five years in the penitentiary.

Q On January 15th, 1935, what were you indicted and convicted for then?

A Burglary.

MR. LETTS: We object, your honor, as that has been over ten years.

MR. DUGGAN: It is not ten years from 1940, your honor.

THE COURT: He is following the convictions and that is the correct order in which they come, isn't it, Mr. Duggan?

MR. DUGGAN: Yes, your honor.

[fol. 43] MR. LETTS: Note our exception, your honor, as that happened more than 10 years ago.

(The above is defendant's bill of exception No. 8)

Q What were you indicted, tried and convicted for then on January 15th, 1935, in Brushy Mountain Parish, Petros, Tennessee?

A Burglary.

Q What did you get for that?

A Four years.

Q How about October 27th, 1931, what . . .

MR. LETTS: Your honor, we object to that and ask the Court to instruct the jury not to consider it. That reaches way back to 1931 and the Court knows it would prejudice and inflame the minds of the jury in this case.

THE COURT: Objection over-ruled.

MR. LETTS: Note our exception.

(The above is defendant's bill of exception No. 9)

Q Where were you arrested on November 29th, 1934?

A In Chattanooga, Tennessee.

Q What about October 27th, 1931, what were you convicted for in Parchman, Mississippi, then?

A Burglary.

[fol. 44] Q What did you get for that?

A Six months, I think.

Q There have been so many offenses you have committed that you can't remember them straight, can you?

MR. LETTS: We object to that remark, your honor.

THE COURT: Objection sustained.

Q It was for burglary in 1931?

A Yes.

Q Have you always gone by the name of Otis Loper?

A Not always.

Q What other names have you gone by?

A Milton Cummings.

Q That was in Mississippi, wasn't it?
A Yes sir.
Q What were you indicted and tried for on that case in Mississippi in 1932?
A Burglary.
Q How much time did you get on that conviction?
A Two years.
Q And that was under the name of Milton Cummings?
A Yes.
Q And that is 4 times that you have been convicted of burglary, a felony?
A Yes.
[fol. 45] MR. DUGGAN: That all, no more questions.

REDIRECT EXAMINATION

Questions by Mr. Letts.

Q Now, tell these gentlemen of the jury, that after going to the penitentiary all of those times that your desire, on coming out, was to lead a clean and different life?
MR. DUGGAN: We object to that question, your honor, as he is putting words in the defendant's mouth.
THE COURT: That is right, objection sustained.
Q What were your intentions when you got out of the penitentiary the last time, you live a different life?
A Yes, and to get a job and settle down.
Q And you got married and had a baby?
A Yes, but I just married the wrong woman.
Q And while you were in jail the baby was taken away from you and your wife?
A Yes sir, it was taken away from us and I didn't know where it was.
Q Now, Otis, I want you to face this jury and tell this jury whether or not you are guilty of this offense you are charged with here?
A I am not guilty of it.
Q And you have been in jail since you were arrested, [fol. 46] isn't that right?
A Yes, I have.

Q Do you know where your wife is now?
A No, sir.
Q You haven't heard from her?
A No, I haven't heard from her since the baby died soon after I was arrested.
MR. LETTS: That's all.

RECROSS EXAMINATION

Questions by Mr. Duggan.

Q After you said you wanted to go straight after going to the penitentiary 4 times and getting out 4 times, you ravished and raped this little 8 year old girl, Betty Fay Darty, didn't you?
A No, sir.
Q And you don't know how she got that injury and caused her private parts, or vagina, to bleed, do you?
A No.
Q And you left the house there soon after her mother returned from the store?
A I had some business to take care of at the Uptown Clinic. Yo have to have a health card where I worked and mine had run out, and my boss told me to get one and I went down to the Uptown Clinic, which is downtown, to get it.
[fol. 47] Q Did you say you and your wife had a fight when she got back from the store?
A Yes, we had an argument.
Q Wasn't that about raping this little girl?
A No, nothing was said about her.
Q You told the little girl what you would do to her if she said anything about it and so you wasn't afraid that she would say anything, were you?
A No, that's not right.
Q But she did say something and you and your wife had a fight about it?
A No, that wasn't what we had the fight about.
MR. DUGGAN: That's all.

REDIRECT EXAMINATION

Questions by Mr. Letts.

Q You say you went down to the Uptown Clinic to get a health card?

A Yes sir.

Q And you took a blood test?

A Yes sir.

Q Have you got that certificate?

A No, sir, I believe I gave that to you.

Q But you did go down there and get your health card, or had it renewed, so you could work?

[fol. 48] A Yes sir.

Q Now, Mr. Loper, can you tell this jury how you think the little girl, Betty Fay, received that injury to her private parts?

A Yes. Mr. McGee's son was always riding over to our house and around there on a bicycle and the little girl went over there occasionally to spend the night with them, and I think it happened over there at the McGee house. I was after my wife about that all the time, about letting the little girl go over there.

Q Then if it happened, how do you think it happened?

A If it happened, I think that boy did it.

Q You think the McGee boy did it, if it happened?

A Yes sir.

Q Anyway, Mr. Loper, after you left the Uptown Clinic you were on your way home and was arrested by the officers?

A After I left the clinic I met a couple of boys I run around with and we went to a show in town.

Q And then you went home, or was on your way home and was arrested?

A Yes sir.

MR. LETTS: That's all, THE DEFENDANT RESTS.

MR. DUGGAN: THE STATE RESTS.

EVIDENCE CLOSED.

(Certificate omitted in printing)

PETITIONER'S EXHIBIT No. 8

IN THE CIRCUIT COURT OF LEAKE COUNTY,
MISSISSIPPI
APRIL TERM OF, 1940

No. 1597

STATE OF MISSISSIPPI

vs.

OTIS LOPER

Came the District Attorney who prosecutes for the State and came also the defendant in his own proper person, both of whom announced ready for trial, came the jury of twelve men towit: Rufus Logan and eleven others, who having heard the evidence both for the State and the defendant, and having received the instructions of the court and argument, retired to the jury room to consider of their verdict; returned into open court the following verdict "We the jury find the defendant guilty as charged in the indictment, whereupon the defendant was asked by the court if he had anything to say why a judgment should not be pronounced against him, said naugh. The court thereupon sentenced the defendant Otis Loper to serve a term of five years in the State Penitentiary and stand committed until fully executed.

PERCY M. LEE
Judge

[Certificate Omitted in Printing]

PETITIONER'S EXHIBIT No. 9

No. 65629

STATE OF TENNESSEE

vs.

OTIS LOPER

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE—DIVISION I

INDICTMENT

December 21, 1934

Court met pursuant to adjournment, present and presiding the Honorable Charles W. Lusk, Judge, etc., when the following proceedings were had, to-wit:

* * * *

65629 State v. Otis Loper—Burglary

The Grand Jurors in a body on December 21, 1934, returned into open Court an indictment against defendant, endorsed, "A TRUE BILL" Robert S. Walker, Foreman of the Grand Jury; State of Tennessee vs. Otis Loper. T. A. Gillespie Proseeutor; Filed: December 21, 1934. Hays Clark Clerk, as follows:

State of Tennessee, Hamilton County, Criminal Court, December, 1934 Term.

The Grand Jurors for the State aforesaid, being duly summoned, elected, impaneled, sworn and charged to inquire for the body of the County afroesaid, upon their oaths aforesaid, present:

That Otis Loper, heretofore on the 29th day of November, 1934, in the County aforesaid did unlawfully, feloniously and burglariously break and enter into the business house of Templeton's Inc., a Corporation, with intent to commit a felony, to-wit a Larceny, and did then and there unlawfully and feloniously take, steal and carry away Eight Gold Bulova strap watches, of the value of $231.00,

the personal property of Templeton's Inc., a corporation, with the intent to convert the same to his own use and to deprive the true owner thereof, against the peace and dignity of the State.

SECOND COUNT:

The Grand Jurors of the State aforesaid, being duly summoned, elected, impanelled, sworn and charged to inquire for the body of the County aforesaid, upon their oaths further present:

That Otis Loper heretofore on the 29th day of November, 1934, in the County aforesaid, did unlawfully, feloniously and fraudulently receive and conceal, with intent to deprive the true owner thereof Eight Gold Bulova strap watches, of the value of $231.00 the personal property of Templeton's Inc., a corporation which had before that time been unlawfully and feloniously taken, stolen and carried away, and he the said Otis Loper well knowing at the time he so received and concealed said property as aforesaid, that the same had been so stolen as aforesaid, against the pease and dignity of the State.

/s/ PEABODY HOWARD
Attorney General

* * * *

Thereupon Court adjourned until tomorrow morning at nine o'clock.

/s/ CHARLES W. LUSK, Judge

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE—DIVISION II

January Term — January 9, 1935

JUDGMENT

Court met pursuant to adjournment, present and presiding the Honorable L. D. Miller, Judge, etc., when the following proceedings were had, to-wit:

* * * * *

65629 State v. Otis Loper—Burglary

Came the Attorney General and the defendant in person, and this case was tried on the defendant's plea of not guilty before the Court and the following jury: Harry Price, J. H. Bullard, J. H. Allen, Paul Smith, John Boren, J. R. Howell, John Henry, George Flinn, H. A. Odum, Jack Smith, Jim McGuire and J. M. Randall, all duly qualified, elected and sworn, who having heard the proof, arguments of Counsel and the charge of the Court on oath say defendant is guilty under First Count and fix his punishment at not more than four (4) years in the Penitentiary.

It is therefore adjudged that defendant be infamous, and he be confined in the penitentiary for a term of not more than four (4) years and pay or secure costs. Execution will issue against defendant for the cost. It is suggested by the Court that defendant have hospital treatment as needed.

* * * * *

Thereupon Court adjourned until tomorrow morning at 9:30 A. M.

/s/ L. D. MILLER, Judge

[Certificates Omitted in Printing]

PETITIONER'S EXHIBIT No. 10

INDICTMENT

The State of Mississippi,
Scott County,

In the Circuit Court of Scott County, Mississippi, at the October Term, in the Year of our Lord Nineteen Hundred and Thirty-One

The Grand Jury for the State of Mississippi, taken from the body of good and lawful men of Scott County, in the State of Mississippi, elected impaneled, sworn and charged to inquire in and for said County, in the State aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present:

That Fred Loper and Otis Loper and Louis Avery in said County, on the ____ day of October A.D. 1931 did then and there wilfully, feloniously and burglariously break and enter the storehouse of P. H. Underwood in which goods, merchandise and other things of value were kept for sale, the property of P. H. Underwood, with intent of them the said Fred Loper and Otis Loper and Louis Avery then and there wilfully, feloniously and burglariously take, steal and carry away certain goods and merchandise, the property of P. H. Underwood found kept for use and sale in said storehouse, a particular description of which is to the Grand Jurors unknown, of the value of $200.00 in lawful money, contrary to the form of the Statute in such case and provided, and against the peace and dignity of the State of Mississippi.

/s/ Percy M. Lee
District Attorney

INDICTMENT

No. 858

CIRCUIT COURT
Scott County.
October Term, 1930

THE STATE OF MISSISSIPPI

vs.

FRED LOPER & OTIS LOPER AND LOUIS AVERY

/s/ Percy M. Lee
Prosecutor

A True Bill:

/s/ [Illegible]
Foreman Grand Jury

Witnesses' Names:

/s/ Wes Cox
/s/ Duff Johnson
/s/ Hi Johnson

Filed this the 7th day of Oct 1931

/s/ Floyd Moseley Clerk

Recorded —— day of —— 193—.

[Certificate Omitted in Printing]

MINUTES, October Term, 7th Day of October, 1931
Minute Book 7, Page 278

State

vs.

Fred Loper, Otis Loper and Louis Ivery

This cause came on this day to be heard and upon arraignment each defendant entered pleas of guilty, as charged in the indictment.

It was therefore the order of the court that they be sentenced at a further day in the term.

[Certificate Omitted in Printing]

MINUTES, October Term, 16th day of October, 1931
Minute Book 7, Page 287

State

vs.

Fred Loper, Otis Loper

This cause came on again on this day to be heard, the defendants on a former day when arraigned plead guilty to a charge of burglary, and *owing* their ages, Fred Loper being only 19 years of age and Otis Loper being only 18 years, the court having this under consideration sentenced each defendant to serve a term of 6 months in the penitentiary, and stand committed to jail until they be transported to the penitentiary, by the proper officer.

[Certificate Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 66-H-657

OTIS LOPER, PETITIONER

v.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT

December 12, 1969

MEMORANDUM AND ORDER:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The application of this petitioner for habeas corpus relief comes before this Court again. His previous applications are so numerous as to fill his file to overflowing. They present an almost insuperable challenge to one who would track their points and their holdings. As early as 1959 the Court of Appeals of this Circuit had occasion to refer to the prolixity of applications by this petitioner [*Loper* v. *Ellis*, 263 F.2d 211 (1959)]. On November 10, 1969, this Court held a plenary hearing pursuant to remand by the Court of Appeals [*Loper* v. *Beto*, 383 F.2d 400 (1967)] directing an evidentiary hearing on the question as to whether petitioner had been deprived of his right to appeal.

In 1947 petitioner was convicted of the rape of his eight year old stepdaughter in one of the criminal district courts of Harris County, Texas. He was represented by H. James Letts and L. D. Harris. Both at that time were experienced and competent attorneys at the Houston Bar, well versed in the trial of criminal

cases. The conviction at the hands of a jury was not appealed.

Following the remand to this Court, competent counsel was appointed to assist petitioner in the gathering of evidence, the preparation for trial and the presentation of his case to this Court. Prior to trial, both counsel and petitioner were instructed that in addition to the single issue remanded to this Court, petitioner was not only permitted, but directed, to raise any points which conceivably might be raised in his behalf. The purpose obviously was the effort to afford petitioner a hearing on any and all questions which might affect the legality of his confinement. Pursuant thereto, a number of other points were raised. They were:

(1) That having been released on parole in 1962, his parole was revoked (for car theft, and escape from jail) in 1963 without his having been afforded a hearing before the Parole Board;

(2) That at the time of his trial in 1947, and while appearing as a witness in his own behalf, on cross-examination he was asked by way of impeachment with reference to some two or more prior felony convictions, it being contended that he was not represented by counsel at the time of such prior felony convictions;

(3) That he was deprived of the testimony of his wife as a witness on his behalf as result of action by the state authorities;

(4) That his representation by counsel was inadequate and insufficient;

(5) That the totality of the circumstances surrounding his trial was such as to constitute fundamental unfairness;

(6) By reason of the fact that he was not present in the Grand Jury room when the witnesses were heard and the indictment returned against him, he was deprived of the opportunity to "confront the witnesses against him"; and

(7) At the time of sentencing, he was not represented by counsel.

At the outset it might be stated that petitioner has made false statements under oath, and has testified to a set of facts so roundly and thoroughly shown to be false by unimpeachable evidence that little or no credence may be placed in his own testimony. Despite the passage of some twenty-two years since the trial, however, there was a surprising amount of credible evidence offered during the present hearing.

Petitioner's points are disposed of as follows:

Abandonment of the Appeal by His Court-Appointed Attorneys.

Mr. Letts, the attorney who took the lead in the defense of petitioner, has been dead a number of years. However, his partner at that time, L. D. Harris, is alive and well and appeared as a witness. He has testified on prior occasions in similar hearings with reference to the same matters. It is his testimony, which I find to be entirely credible and which I accept, that following the trial he and Letts discussed the matter of an appeal with petitioner; that petitioner advised his attorneys without qualification that he did not wish to, and would not take an appeal. Mr. Harris thought petitioner was very angry, and perhaps emotionally upset at that time. Thereafter, in an abundance of caution and to protect petitioner if he later changed his mind and desired to appeal, Harris filed a formal motion for new trial within the time prescribed by the state practice, this being a jurisdictional requirement for an appeal. Neither he nor Letts were ever contacted by petitioner as to a change of heart and he was never asked by petitioner or anyone else to appeal his case.

It is petitioner's testimony that he wrote his attorneys that he desired to take an appeal and inquired of the trial judge with reference to procuring a copy of the necessary court records. He states that the trial judge referred him to the court clerk with respect thereto, Mr. Harris knew nothing of such letter. In light of the energy and diligence shown by the attorneys in representing the defendant at the trial, I am convinced that had such request been made they would have complied with their

duty with respect thereto. I find as a fact that petitioner made no such request of his attorneys and made no such request of the district judge or other state official. Hence I find this point without merit.

Parole Revocation.

It is undisputed that petitioner was granted parole in 1962 and paroled to the state of Mississippi under the Interstate Parole Compact. Several months thereafter he was charged with car theft and while being confined on such charge escaped from jail by sawing his way out with a hacksaw blade. Revocation of his probation was recommended to the Governor of the state of Texas and the Governor took the recommended action. Petitioner was a fugitive for approximately a year thereafter and ultimately was re-arrested. In this state the holding of a hearing by the Board of Pardons and Paroles is discretionary. *Ex Parte Sellars*, 384 S.W.2d 351 (Tex.Ct.Crim. App. 1964); *Ex Parte Lewis*, 339 S.W.2d 900 (Tex.Ct. Crim.App. 1960), *cert. denied*, 368 U.S. 960. Such hearings are not constitutionally required. *Escoe* v. *Zerbst*, 295 U.S. 490 (1935); *United States ex rel Heacock* v. *Myers*, 251 F.Supp. 773 (E.D.Penn. 1966); *Johnson* v. *Tinsley*, 234 F.Supp. 866 (D.Colo. 1964). Irrespective of any other consideration, it would appear that his admitted escape from custody and remaining at large for an extended period would constitute a valid basis for the revocation. This point is without merit and is denied.

Reference to Prior Felony Convictions.

With respect to this point petitioner undertakes to equate the reference in his cross-examination with respect to prior felonies, for impeachment purposes only, to those authorities wherein prior felony convictions, secured without the presence of counsel are used for enhancement of punishment. First, it should be noted that there is no evidence other than petitioner's own statement that he was not represented by counsel at the time of his prior convictions, which evidence, as stated above, I decline to accept as credible. Second, no objection on this ground

was made at the time that the impeaching testimony was offered. Had such objection been made, opportunity would have been offered for an inquiry into the matter and no doubt the trial judge would have taken appropriate action. As the matter was purely of an evidentiary nature, and particularly in the absence of objection, the question does not rise to constitutional stature and is not subject to collateral attack. *Cf. Luna* v. *Beto*, 395 F.2d 35 (5th Cir. 1968), *cert. denied*, 394 U.S. 966.

Failure to Offer the Testimony of the Wife as a Witness

This question has been raised by petitioner repeatedly in prior proceedings and after full consideration and evidentiary hearing, the point has been denied. I refer to *Loper* v. *Ellis*, C.A. 8469 (S.D. Tex. 1956), *Loper* v. *Ellis*, 224 F.2d 901 (5th Cir. 1955), and *Loper* v. *Rushing*, C.A. 2641 (E.D. Tex. 1959). These prior dispositions are bottomed on the fact that petitioner never showed wherein his wife's testimony would have been to his advantage. The question having heretofore been repeatedly determined, this Court adopts that action.

As a matter of interest, however, it should be noted that with respect to this issue, Mr. Harris has testified that the wife was in the corridor of the courthouse awaiting her time to testify earlier in the day. When he (Harris) went to the corridor to call her, he was told by bystanders that the lady was drunk, and had left the courthouse. A motion for continuance (at this point, in the middle of the trial) was denied.

Inadequate Representation of Counsel.

Petitioner here contends and has testified to minimal contact with his attorneys prior to and following the trial. He would have the Court believe that his lawyers had done nothing more than meet him at the courtroom, conduct the trial, and then abandon him. Such is not the case. From Harris's testimony I find as a fact that his attorneys, through their employed investigator, had contacted the various witnesses listed on the state's complaint well prior to trial and had ascertained the sub-

stance of their testimony; that the attorneys had examined carefully into the indictment for any flaw which they might find therein; that they had consulted fully with the district attorney with respect to a plea of guilty and an agreed sentence, had arrived at an agreement whereby the petitioner would plead guilty in return for a ten year sentence, a trade which petitioner declined to accept. I find as a fact that the representation of his counsel was entirely adequate and fully in keeping with the obligation of the attorneys concerned. They did the very best they could for him with what they had to work with.

The Totality of the Circumstances.

I am unable to determine to what the petitioner points under this claim other than the fact that the trial lasted no more than one day, being concluded in the afternoon rather than before noon as he has testified. It would appear that there was a clear-cut jury issue as to whether the petitioner had committed the offense, a question which the jury resolved against him. This point is likewise without merit.

Presence of the Attorney at the Time of Sentencing.

This point likewise has been raised on a number of prior occasions, at least one plenary hearing held, and resolved against petitioner. I refer to *Loper* v. *Ellis*, No. 12226 (S.D. Tex. 1958), aff'd. 263 F.2d 211 (5th Cir. 1959); *Loper* v. *Ellis*, No. 2236 (E.D. Tex. 1957). The testimony at such former hearings clearly shows that Mr. Letts was present at the time of the sentencing and did what he could in petitioner's behalf.

At the present hearing Mr. Harris testified that the matter of the sentencing was noted on Mr. Letts' calendar, that Letts left the office for the purpose of going to the courthouse for this purpose, and on his return discussed what had transpired with his partner, Harris. I find that petitioner's testimony to the contrary is completely false. This point is denied.

The Contention That the Right to Confrontation of Witnesses Includes Testimony of Such Witnesses Before the Grand Jury.

This point is considered frivolous and in denied without further comment.

As stated at the outset, petitioner has filed innumerable applications for relief. Pound for pound, he is probably the most prolific writer of writs to come before this Court. His applications, verified under oath, and his testimony in open court under oath, have been found repeatedly to be completely false. In the present hearing, as stated, with competent counsel to assist, he had been instructed to raise every point within his knowledge or desire. In the event of an application to appeal in forma pauperis, I expect to grant same, and in the event of affirmance, the clerk is instructed not to receive further applications from this petitioner, but to return them to him. Any further applications I consider to be an abuse of the writ.

The various points raised having been found to be without merit, the application is denied and the proceedings dismissed.

Done at Houston, Texas, this 12th day of December, 1969.

/s/ Ben C. Connally
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 66-H-657

OTIS LOPER, PETITIONER

v.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT

JUDGMENT

Pursuant to the Memorandum and Order filed this date, it is the judgment of this Court that petitioner's motion to vacate sentence be denied.

Done at Houston, Texas, this 12th day of December, 1969.

/s/ Ben C. Connally
United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 29235

OTIS LOPER, PETITIONER-APPELLANT

versus

DR. GEORGE J. BETO, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Southern District of Texas

(March 24, 1971)

Before GEWIN, MORGAN and ADAMS,*
Circuit Judges.

GEWIN, Circuit Judge: Petitioner Otis Loper appeals from the denial of his petition for writ of habeas corpus. After conducting a thorough and extensive hearing on the petition, Judge Connally denied the writ in an unreported opinion wherein he made findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a). We find no error in the findings and conclusions of the district court, and affirm.

Loper was charged and convicted of the statutory rape of his eight year old step daughter in the district court of Harris County, Texas on November 17, 1947. On November 20, 1947 Loper's motion for new trial was denied, and he was sentenced to serve fifty years in the state penitentiary. He did not appeal.

* Of the Third Circuit, sitting by designation.

After serving fifteen years of his sentence, Loper was paroled on November 9, 1962 from the Texas Department of Corrections and given permission to move to Mississippi where he was assigned to a Mississippi state parole officer for supervision. Loper's parole, however was of short duration. On February 5, 1963 he was arrested in Mississippi for car theft. Thereafter, when the Texas Board of Pardons and Paroles learned from the Mississippi Parole Board that Loper had been arrested for car theft and that the evidence against him was conclusive, the Board recommended to the Governor of the State of Texas that he revoke Loper's parole. In accordance with this recommendation recommendation the Governor on March 4, 1963, entered a parole revocation order and directed the issuance of a warrant for Loper's arrest. Before this order could be executed, however, Loper escaped from Carthage, Mississippi, jail and remained a fugitive for over a year. When he was finally apprehended on April 6, 1964, in St. Joseph, Louisiana, he was taken into custody and eventually transported to the Texas Department of Corrections where he has since remained incarcerated.

Beginning in 1949 Loper has unsuccessfully filed a steady succession of petitions for the writ of habeas corpus, in the State District Court, the Court of Criminal Appeals, and at least two United States District Courts.[1] Following Loper's most recent petition,[2] the district court held a plenary hearing on November 10, 1969 pursuant to the order of this court directing an evidentiary hearing on the question whether petitioner had been deprived of his right to appeal. Prior to the hearing petitioner and his court-appointed counsel were instructed that, in addition to the single issue remanded to the district court, petitioner should present any and all conceivable issues which might be raised on his behalf so that the legality of his

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[1] For the reported cases, see: Loper v. Beto, 383 F.2d 400 (5th Cir. 1967); Loper v. Ellis, 263 F.2d 211 (5th Cir. 1959); Loper v. Ellis, 224 F.2d 901 (5th Cir. 1955); Ex parte Loper, 223 S.W.2d 523 (Tex.Crim.App. 1949); Ex parte Loper, 219 S.W.2d 81 (Tex. Crim. App.), cert. denied 337 U.S. 946, 93 L.Ed. 1749 (1949).

[2] Loper v. Beto, 383 F.2d 400 (5th Cir. 1967).

confinement might be conclusively determined. In accordance with these directions the following points were raised: (1) the propriety of impeaching defendant by prior convictions wherein he was not represented by counsel; (2) the adequacy of representation of counsel; (3) the alleged suppression of evidence by the state; (4) the denial of parole revocation hearing; (5) and the denial of pre-trail discovery.

Impeachment by Prior Conviction

At his state court trial for rape in 1947, Loper took the stand and testified in his own behalf. During the cross-examination of Loper, counsel for the state asked him how many times he had been convicted of a felony in Texas or any other state. Loper readily admitted that he had been convicted of burglary on four different occasions during the period 1931-40—three times in Mississippi and one time in Tennessee. On one of the occasions in question he used the assumed name of Milton Cummings. No objection as to the validity of these convictions was raised and the records of the convictions were not offered in evidence.[3] The evidence in question was introduced solely for the purpose of impeachment; it did not relate to, or increase the punishment. There is not the slightest suggestion in the record that the state of Texas had any knowledge of a possible infirmity in the convictions. Loper now insists that evidence of these convictions was not admissible for the purpose of impeachment because the convictions were obtained in violation of the principles of *Gideon* v. *Wainwright*.[4] He claims that he did not have counsel at these trials and that he did not voluntarily or intelligently waive the right to counsel.

On this issue Loper places heavy reliance upon *Burgett* v. *Texas*.[5] which held that former convictions when coun-

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[3] Counsel for Loper objected to some of this evidence on the ground that one or two of the convictions were too remote in time.

[4] 372 U.S. 335, 9 L.Ed.2d 799 (1963).

[5] 389 U.S. 109, 19 L.Ed.2d 319 (1967).

sel was not provided or intelligently waived could not be used for the purpose of enhancement under the Texas Penal Code. By analogy he argues that the same rule should apply to the use of such former convictions for the purpose of impeachment. We decline to extend the teachings of *Burgett* to the situation here presented. The convictions mentioned have been of record for a number of years, yet the record before us does not disclose that any attack has ever been made upon those convictions. Except for the assertions of Loper the record fails to furnish any conclusive information as to the facts and circumstances surrounding his former convictions. So far as the record before us reveals, there are outstanding, unchallenged, state court convictions of felonies in the States of Mississippi and Tennessee. We recognize the force of Loper's argument to the effect that such convictions may have impaired his credibility in the minds of the jury as a witness in his own behalf; nevertheless, if the convictions possessed the infirmities which Loper claims, he has failed to make any effort to set them aside for over 30 years. No one else could have done so. Surely such an attack was available to him in view of the retroactive application of the *Gideon decision* which was decided over six years prior to the hearing under review. Furthermore, it is obvious to us that the use of such convictions as evidence for purposes of impeachment which goes only to credibility, is not nearly so serious as the use of a conviction for enhancement, which may add years of imprisonment to the sentence of a defendant. Although we do not feel bound on this issue by decisions of the Texas Court of Criminal Appeals, we do take note of the fact that decisions in the State of Texas have declined to accept Loper's contention.[6] Moreover, in the recent case of *Barboso* v. *Craven*,[7] the Ninth Circuit likewise refused

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[6] Bustillos v. State, —— S.W.2d ——, 8 CrL 2425 (Tex. Ct. Crim. App. Feb. 17, 1971). Sammons v. State, 456 S.W.2d 66 (Tex. Cr. App. 1970).

[7] 431 F.2d 698 (9th Cir. 1970). In so ruling the court stated:

> It is settled California law that a defendant may be impeached by prior convictions not withstanding California Penal Code § 1025. People v. Ricci, 239 Cal.App.2d 238, 48 Ca.Rptr. 631 (1966).

to grant relief in the circumstances here presented. The issue presented raises an evidentiary question. The fact that there are possible infirmities in the evidence does not necessarily raise an issue of constitutional proportions which would require reversal. In *Chapman* v. *California* the Court stated:

> We conclude that there may be come constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.[8]

Effective Representation of Counsel

Petitioner contends that the trial court erred in not holding that he was deprived of effective representation of counsel. Although the right to counsel means the right to effective assistance of competent counsel,[9] the Sixth Amendment does not guarantee subjectively satisfactory results for those accused of crime; nor does it guarantee errorless and prevailing counsel, or even the best counsel available.[10] As we said in *MacKenna* v. *Ellis*:[11]

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[8] 386 U.S. 18, 22. See also Dutton v. Evans, —— U.S. ——, 27 L.Ed.2d 213.

A typical example of the use of improper evidence which does not require reversal arises when perjured testimony is used *without* the knowledge of agents of or counsel for the state. See; Mooney v. Holohan, 294 U.S. 103 (1935); Jackson v. United States, 384 F.2d 675 (5th Cir. 1967), cert. denied 392 U.S. 932; Enzor v. United States, 296 F.2d 62 (5th Cir. 1961); Sears v. United States, 265 F.2d 301 (5th Cir. 1959); United States v. Jakalski, 237 F.2d 503 (7th Cir. 1956).

[9] McMann v. Richardson, —— U.S. ——, 25 L.Ed.2d 763, 773 (1970).

[10] See: United States v. Rubin, 433 F.2d 442, 444 (5th Cir. 1970); Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1969); Bendelow v. United States, 418 F.2d 42, 50 (5th Cir. 1969); Odum v. United States, 377 F.2d 853, 859 (5th Cir. 1967).

[11] 280 F.2d 592 (5th Cir. 1960).

> We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.[12]

Only if the attorney's conduct is "shocking to the conscience of the Court" can the charge of ineffective counsel prevail.[13]

After an evidentiary hearing at which petitioner was represented by court-appointed counsel at which petitioner himself testified on the matter, the trial court found the following facts: that Loper's attorneys [14] had contacted various witnesses listed on the state's complaint prior to trial and had ascertained the substance of their testimony; that the attorneys had examined the indictment for flaw; that they had consulted with the District Attorney with respect to the plea of guilty and an agreed sentence, had arrived at an agreement, whereby the petitioner would plead guilty in return for a ten year sentence, a trade which petitioner declined to accept; and finally that they took steps to appeal the judgment of conviction but were dissuaded from doing so by Loper.[15] From these facts

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[12] Id. at 599. See: Bendelow v. United States, 418 F.2d 42, 50 (5th Cir. 1969).

[13] United States v. Mancuso, 423 F.2d 23, 29 (5th Cir. 1970).

[14] Petitioner either retained or was assigned two attorneys to represent him on the rape charge. Both were experienced lawyers in the trial of criminal cases; one in fact had specialized for over 30 years in the defense of criminal cases.

[15] Although Loper insisted that his attorneys deprived him of his right to appeal, the district court dismissed this contention after making the following factual determination:

> "L. D. Harris, [one of petitioner's attorneys] testified on prior occasions in similar hearings with reference to the same matters. It is his testimony, which I find to be entirely credible and which I accept, that following the trial he and Letts [Loper's other attorney] discussed the matter of an appeal with petitioner; that petitioner advised his attorneys without qualification that he did not wish to, and would not take an appeal." (R. 278).

See: Lamar v. Wainwright, 423 F.2d 1104 (5th Cir. 1970); Ballard v. Howard, 403 F.2d 653 (6th Cir. 1968).

the court concluded that Loper's contention that he was deprived of effective representation of counsel was without merit.

Upon a full consideration of all of the testimony presented, this court must conclude that the findings of the district court were not clearly erroneous. Rule 52(a), F.R.Civ.P.

Suppression of Evidence

Petitioner claims that he was denied due process of law because the state suppressed evidence favorable to his defense. He contends that the state threatened to prosecute his wife, Willette Loper, for insufficient supervision of her daughter if she appeared at the trial and that this threat caused her to leave town so that she could not testify in his behalf.

With reference to the availability of Mrs. Loper as a witness and the possible relevancy of her testimony, it is fair to state that all of the evidence developed in the district court does not point in one direction. There was evidence tending to indicate that Mrs. Loper was present in the hallway of the courthouse during the trial, but that she was intoxicated. J. H. Letts, one of Loper's attorneys, although now deceased, testified in 1949 in a habeas corpus proceeding as follows:

> Your wife, Willette Loper, was here the time of your trial, but she did not take the witness stand and testify." She was outside of the Courtroom in the hall. She had too much to drink and couldn't take the witness stand. I called for her but she didn't come in the Courtroom.[16]

Defense attorneys asked for a continuance and the state trial court inquired of them as to the nature and materiality of Mrs. Loper's proposed testimony. Defense counsel indicated that Mrs. Loper's proposed testimony would relate to what "the little girl" (alleged victim) said

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[16] This statement appears in a short transcript in narrative form certified by the official Court Reporter of the Criminal Court of Harris County, Texas, on the 13th day of September 1949.

to Mrs. Loper upon her return from the grocery store following the alleged rape. The state trial judge denied the motion for continuance on the ground that such testimony would only corroborate that of the victim. It should be noted that there are strong indications in the record that Mrs. Loper took the victim to the hospital for a medical examination on the day the crime was supposed to have been committed.

While we do not necessarily agree with the reasons assigned by the Texas trial court for denying the motion, we cannot conclude that the ruling was of such magnitude and importance as to require a reversal of the finding of the United States District Court on this issue. It is important to remember that according to the victim's testimony the attack occurred in the absence of Mrs. Loper—she had gone to the grocery store. We also take particular note of the affidavit of Mrs. Loper in which she charged that the Texas authorities had threatened her in order to prevent her testimony. To say that this "purported affidavit" is of dubious quality merely echoes the accurate description of the affidavit in *Loper* v. *Ellis* [17] wherein the court said:

> It is dated April 26, 1948, and is addressed "To the Honorable Judges: Court of Criminal Appeals; State of Texas." It is certified as being a true copy by the Clerk of the Court of Criminal Appeals of Texas. The Harris County authorities charged with making the alleged threat are not named as individuals or by office. The affidavit does not give the address of the affiant, though appellant states it was made at Dora, Alabama, in Walker County. The seal of the justice of the peace is not shown on the certified copy, except for notation. Neither does the affidavit express a willingness on the part of affiant to return voluntarily to testify in person.

Our examination of the record, several exhibits and the decisions dealing with this case, fails to make clear just what testimony Mrs. Loper would have given if she had

[17] 224 F.2d 901, 904 (5th Cir. 1955).

testified. Her affidavit executed sometime after the trial does purport to constitute an *ex parte* assertion that she left town because of a "warning" from Harris County authorities; nevertheless, substantial evidence in the record contradicts this assertion. The testimony of Mr. Letts, counsel for the appellant at the original trial, contradicts it. Moreover, the transcript of the original trial strongly indicates that Loper and his wife were completely estranged following the alleged attack on Mrs. Loper's eight year old daughter. At his state court trial Loper testified that he had not heard from his wife "since soon after" he was arrested. He further testified that he and Mrs. Loper had a fight on the day of the alleged rape soon after Mrs. Loper returned from the grocery store, although he stated that the fight was not the result of any attack on the child. At one point in the trial he volunteered the statement, "I just married the wrong woman."

In rejecting the contention with respect to the suppression of evidence, the district court relied upon the fact that this question had been raised repeatedly in prior proceedings and asserted:

> This question has been raised by Petitioner repeatedly in prior proceedings and after full consideration and evidentiary hearing, the point has been denied. I refer to Loper v. Ellis, C.A. 8469 (S.D. Tex. 1956), Loper v. Ellis, 224 F.2d 901 (5th Cir. 1955), and Loper v. Rushing, C.A. 2641 (E.D. Tex. 1959). These prior dispositions are bottomed on the fact that Petioner never showed wherein his wife's testimony would have been to his advantage. The question having been heretofore repeatedly determined, this court adopts that action.

Further, the district court took note of the fact that Mr. Harris, surviving associate counsel who represented Loper during the rape trial, testified that he understood that Mrs. Loper was in the corridor of the courthouse during Loper's trial. He stated that he was informed by others present that she was drunk and had left the courthouse. In addition to the reasons assigned by the district court

on this point, we are firm in our judgment that the record amply supports the conclusion that the state did not suppress evidence by causing Mrs. Loper to leave.[18] For all of the foregoing reasons we are unable to conclude that the district court committed error with respect to this conclusion.[19]

Parole Revocation

Loper next attacks the Texas parole revocation procedure contending that he was denied equal protection of the law because his parole was revoked without a hearing. He argues that the Texas law in effect at the time of his parole revocation provided two dissimilar and discriminatory methods by which revocation could be accomplished. On the one hand, Article 781b of the Texas Code of Criminal Procedure delegated the power to revoke paroles to the Board of Pardons and Paroles, and provided the following revocation procedure:

> Sec. 20. . . .
>
> Whenever a paroled prisoner is accused of a violation of his parole on information and complaint by a law enforcement officer and/or probation and parole officer *he shall be entitled to be heard on such charges before the Board on such rules and regulations as the Board may adopt;* provided, however, said hearing shall be held within forty-five days of the date of arrest and at a time and place set by the Board. (Emphasis added)

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[18] The prosecution issued subpoenas for several persons including the mother of the victim, Willette Loper. All of the subpoenas were served except for the subpoena on Mrs. Loper; her subpoena had been returned unserved with the notation that her whereabouts were unknown. The prosecution did not attempt to call Mrs. Loper to the witness stand because under Texas law a wife cannot be used as a witness against her husband.

[19] Lamar v. Wainwright, 423 F.2d 1104, 1106 (5th Cir. 1970); Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); Washington v. Smith, 417 F.2d 301, 302 (5th Cir. 1969); Heath v. Wainwright, 408 F.2d 1020 (5th Cir. 1969). Cf. Ballard v. Howard, 403 F.2d 653 (6th Cir. 1968).

By contrast, Article 4, Section 11, of the Texas Constitution made no reference to revocation procedure but simply granted the governor the "power to revoke paroles and conditional pardons." Petitioner interprets the above two provisions to allow those whose parole is revoked by the Parole Board to have a revocation hearing, but to deny a hearing to those whose parole is revoked by the governor. From this view he insists that the Texas criminal procedure is in violation of the equal protection clause because it prescribes a different procedure for persons in like situations.

In a proper case we might tend to agree with petitioner's statement of the law, but under the facts and in the circumstances presented by the record before us we reject his contention. There is respectable authority to the effect that the United States Constitution does not compel a state to provide a hearing before exercising its discretion to terminate parole.[20] Nevertheless, it is elemental that the right to equal protection under state law includes the right to be tried in the same manner as others accused of similar infractions. Thus, once a state has determined to provide by statute the right to a hearing on the question of parole revocation, as Texas did with Article 781b, Tex.R.Cr.P., it must accord the benefits of that procedural right equally to all parolees in

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[20] Although the traditional view is that the Constitution does not require a hearing before terminating parole, see Escoe v. Zerbst, 295 U.S. 490, 79 L.Ed. 1566 (1935); Burns v. United States, 287 U.S. 216, 77 L.Ed. 266 (1932); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949) aff'd. 320 U.S. 880, 95 L.Ed. 656 (1950); Goldsmith v. Sanford, 132 F.2d 126 (5th Cir. 1942) cert. denied 318 U.S. 744, 87 L.Ed. 1122; Hamrick v. Boles, 231 F. Supp. 507 (N.D. W. Va. 1964); there exists critical commentary which would require the application of *due process* in the granting and revocation of parole. The following articles, notes and comments are representative: Cohen, *Sentencing, Probation and the Rehabiliative Idea*, 47 Tex.L. Rev. 1 (1968); Milligan, *Parole Revocation Hearings in California and the Federal System*, 4 Cal. West. L. Rev. 18 (1968); Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. Crim. L. 175 (1964); Comment, *Rights v. Results: Quo Vadis Due Process for Parolees*, 1 Pacific L.J. 321 (1970); Comment, *Constitutional Law; Parole Status and the Privilege Concept*, 1969 Duke L.J. 139, 28 So. Cal. L. Rev. 158 (1955).

similar circumstances.[21] Failure to afford a hearing on a legitimate request in circumstances and under facts which meet the requirements and provisions of the Texas statute might deprive a parolee of "equal protection" of the state law, a right guaranteed by the appropriate provision of the Fourteenth Amendment.

Loper relies on the statute cited above and rules and regulations of the Board of Pardons and Paroles adopted pursuant to its provisions. Such rules and regulations provide for a hearing within forty-five days after arrest on a parole revocation warrant. He contends that he requested a hearing but was not given one.

With respect to the issue of parole revocation, the United States District Court concluded:

> It is undisputed that petitioner was granted parole in 1962 and paroled to the state of Mississippi under the Interstate Parole Compact. Several months thereafter he was charged with car theft and while being confined on such charge escaped from jail by sawing his way out with a hacksaw blade. Revocation of his probation was recommended to the Governor of the state of Texas and the Governor took the recommended action. Petitioner was a fugitive for approximately a year thereafter and ultimately was re-arrested. In this state the holding of a hearing by the Board of Pardons and Paroles is discretionary. Ex parte Sellars, 384 S.W.2d 351 (Tex. Ct. Crim. App. 1964); Ex Parte Lewis, 339 S.W.2d 900 (Tex. Ct. Crim. App. 1960), *cert. denied*, 368 U.S. 960. Such hearings are not constitutionally required. *Escoe* v. *Zerbst*, 295 U.S. 490 (1935); *United States ex rel Heacock* v. *Myers*, 251 F. Supp. 773 (E.D. Penn. 1966); *Johnson* v. *Tinsley*, 234 F. Supp. 866 (D. Colo. 1964). Irrespective of any other consideration, it would appear that his admitted escape from custody and remaining at large for an extended period

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[21] See: Cochran v. State of Kansas, 316 U.S. 255, 86 L.Ed. 1453 (1942); Hewett v. State of North Carolina, 415 F.2d 1316, 1322 (4th Cir. 1969); Hamrick v. Boles, 231 F. Supp. 507, 510 (N.D. W. Va. 1964).

would constitute a valid basis for the revocation. This point is without merit and is denied.

The record discloses that the order of the Governor of Texas revoking petitioner's parole was dated March 4, 1963. He escaped from the jail in Mississippi within two weeks thereafter, on March 21, 1963. Loper testified, somewhat equivocally, that he demanded a parole revocation hearing while he was in jail in Mississippi. He further testified that when he was arrested in June 1964, over a year later, he stated to the arresting officers that he desired to have a parole hearing. The credibility of Loper is subject to serious doubt. As a matter of fact the district court concluded that he had falsely testified to material facts from time to time. In any even, if it is believed that Loper requested a hearing in accordance with the rules and regulations of the Board, while confined in the Mississippi jail between March 4 and March 21, it would have been impossible to hold such a hearing in view of the fact that Loper was a fugitive from justice from March 21, 1963 until June 1964. In fact we think it is incredible to conclude that he was seeking a hearing before the Texas Board of Pardons and Paroles during the very period in which he was a fugitive, particularly in light of his conduct during this period. The records indicate that he was apprehended in the State of Louisiana while he was an escapee and charged with driving while intoxicated, for which he served a period of 60 days. He was also arrested during the period of escape in Louisiana for carrying a concealed weapon, but these charges were dropped. Texas did not obtain custody of him until the latter part of June 1964. In view of these facts we are unable to conclude that the district court reached an improper conclusion or that Loper has been denied any constitutional right.[22]

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[22] We do not decide the question whether a state may treat out of state parolees in a different manner from those within the state. If we should disregard the particular facts of this case, it could be argued that serious doubts would still remain as to the equal protection argument. A parolee who is granted permission to leave the sentencing state and spend his time on parole in another state, is not in the same situation as those parolees who remain in the sen-

Moreover, the court has received assurances from respondent as well as from the Texas Board of Pardons and Paroles that in all cases where "a parole has been revoked by the Governor, the parolee or his representative may request a hearing before the Board at any time, seeking reinstatement of parole." [22] In accordance with this procedural stipulation by the Parole Board, we reject petitioner's contention that Article 781(b) Tex. Cr. P. and Article 4, Section 11 of the Texas Constitution should be read separately and apart to the end that petitioner is deprived of the equal protection of the Texas law. In-

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tencing state. A state would be at a substantial disadvantage if it could not revoke the parole of a violator beyond its borders without first conducting a hearing. The holding of a revocation hearing in such circumstances could present many practical difficulties involving arrest, custody and similar problems. In certain circumstances it may not be unreasonable to conclude that the sentencing state has a legitimate interest in a rule which permits the revocation of a parole and the apprehension of an alleged parole violator who is beyond its orders without a hearing prior to revocation.

[22] Letter from Pat Bullock, member Texas Board of Pardons and Paroles to Robert Darden, Assistant Attorney General, October 14, 1970. The letter in its entirety reads:

"Dear Mr. Darden:

In response to your question concerning the standard of the Texas Board of Pardons, and Paroles with reference to parole revocations, please be advised that when the Board of Pardons and Paroles of Texas receives a report from a law enforcement officer or a parole officer that a parolee has violated the conditions of his parole, revocation is recommended immediately, pending further investigation, or if the facts presented to the Board are conclusive, revocation is recommended immediately without further investigation. This is standard procedure.

This procedure does not apply when the Governor exercises his constitutional authority to revoke a parole without a recommendation from the Board of Pardons and Paroles.

If a parole has been revoked by the Governor, the parolee or his representative may request a hearing before the Board at any time, seeking reinstatement of parole.

Very truly yours,

/s/Pat Bullock
PAT BULLOCK
Member"

stead, we advert to the fundamental rule of statutory construction that statutes and acts in pari materia should be construed together. Following this rule, Article 4, Section 11 should be construed with reference to, or in connection with Article 781(b) rather than be singled out for independent consideration. We hold, therefore, that Loper may request a hearing before the Board seeking reinstatement of his parole.[24]

Denial of Pre-trial Discovery

Petitioner asserts as his final contention that the district court erred in rejecting his pre-trial requests for Admissions and Written Interrogatories. Petitioner's counsel, in an effort to discover evidence which would be helpful to Loper in his habeaus corpus proceedings, served the state with interrogatories and Request for Admissions of Relevant Facts pursuant to Rule 33 and 36, Fed. R. Civ. P. When the state filed objections on the ground that the Request for Admissions was not authorized in federal habeas corpus proceedings, the court made the following docket entry:

> 8-26-69: Respondent's Motion to Deny Request for Admission and Written Interrogatories is hereby granted. Harris v. Nelson, 394 U.S. 286 (1969).

In *Harris* v. *Nelson*[25] the Supreme Court held that while the discovery provisions of the Federal Rules of Civil Procedure do not apply to habeas corpus proceedings, a "dis-

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[24] There is little doubt in our minds that Loper will be given full consideration by the Board of Pardons and Paroles of the State of Texas. Attached to a pro se brief filed by him in this cause is a letter from the Board dated March 4, 1970, wherein it is stated:

> You know your long record; you know you have been paroled and violated that parole. I don't think you should accept the fact that you will never be paroled again. Your case is set for parole consideration in June, 1971, and it will be carefully evaluated at that time. No one knows now what decision the Board will reach at that time but don't give up hope. Continue your good adjustment and make the best ratings possible.

[25] 394 U.S. 286, 22 L.Ed. 281 (1969), reh. den. 394 U.S. 1025.

trict court may, in an appropriate case, arrange for procedures which will allow development, for purposes of the hearing, of the facts relevant to the disposition of a habeas corpus petition." The court indicated that the nature and extent of permissible discovery is committed to the discretion of the district court, and furnished a general guideline for the courts to follow:

> We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore, entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles of law." [36]

In *the circumstances of this case and considering the full evidentiary hearing afforded* petitioner on each of his contentions, in addition to numerous other court proceedings in which he has attacked his conviction, we are convinced that the trial court did not abuse its discretion in denying the Request for Admissions and Written Interrogatories.[37]

Due process postulates a day in court which means that no one shall be personally bound until he has been afforded a full opportunity to be heard. Beyond that there must be a point at which the legality of confinement

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[36] Id. at 300, (22 L.Ed.2d 291).

[37] See: United States v. Wolfson, 413 F.2d 804, 807 (2d Cir. 1969); Wilson v. Wiegel, 387 F.2d 632 (9th Cir. 1967); Wilson v. Harris, 378 F.2d 141, 142 (9th Cir. 1967); United States v. Wilman, 304 F.2d 53 (5th Cir. 1962); Levy v. Parker, 316 F.Supp. 473 (M.D. Pa. 1970).

is conclusuively and finally determined unless our courts are to bog down completely. With Otis Loper we think that point has been reached and passed.[28]

AFFIRMED.

[28] We deem it appropriate to state that on this appeal counsel for Loper, appointed by the court, have rendered outstanding service. They have presented his contentions in a clear and cogent manner.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1970

No. 29235

D. C. Docket No. CA 66-H-657

OTIS LOPER, PETITIONER-APPELLANT

versus

DR. GEORGE J. BETO, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT-APPELLEE

Appeal from the United States District Court
for the Southern District of Texas

Before GEWIN, MORGAN and ADAMS,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 24, 1971

Issued As Mandate:

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* Of the Third Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 29235.

OTIS LOPER, PETITIONER-APPELLANT

versus

DR. GEORGE J. BETO, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Southern District of Texas

(April 26, 1971)

ON PETITION FOR REHEARING

Before GEWIN, MORGAN and ADAMS,* Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

* Of the Third Circuit, sitting by designation.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29235

OTIS LOPER, PETITIONER-APPELLANT

versus

DR. GEORGE J. BETO, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT-APPELLEE

Appeal from the United States District Court
for the Southern District of Texas

(April 26, 1971)

ON PETITION FOR REHEARING

Before GEWIN, MORGAN and ADAMS,* Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing pro se filed in the above entitled and numbered cause be and the same is hereby DENIED.

SUPREME COURT OF THE UNITED STATES

No. 70-5388

OTIS LOPER, PETITIONER

v.

DR. GEORGE J. BETO, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition which reads as follows:

"Does the use of prior, void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case?"

October 12, 1971

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 480298 304